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In the Supreme Court

OF THE

United States

OCTOBER TERM 1992

CITY OF VERNON,
Petitioner,
vs.
SOUTHERN CALIFORNIA EDISON COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

1. Does a vertically integrated electric utility with monopoly power in all relevant markets that denied a city (its wholesale customer and competitor) reasonable access to its transmission system (concededly essential to competition in the relevant markets) have a valid business justification defense to the city's Sherman Act Section 2 claim (15 U.S.C. § 2) on the ground that permitting the city to compete with it for wholesale power could adversely affect the utility's prices to its retail customers?

2. When a city has proved its *prima facie* case of Section 2 liability against an electric utility that denied the city access to transmission, can summary judgment against the city be sustained on the ground that pro rata sharing of the facility, assumed in the city's damage study, is unreasonable as a matter of law thereby destroying the city's proof of any damages?

LIST OF PARTIES

The parties to the proceedings in the Central District of California and the United States Court of Appeals for the Ninth Circuit were Petitioner City of Vernon, Plaintiff, and Respondent Southern California Edison Company, Defendant below.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner City of Vernon ("Vernon") respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed February 7, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is printed in the Appendix ("App." concurrently filed herewith) at pages 23 *et seq.* The order of the Court of Appeals denying Vernon's petition for rehearing and suggestion for en banc consideration is printed in App. at page 24. The findings of fact and conclusions of law filed by the District Court for the Central District of California are printed in App. at pages 25 *et seq.* The judgment of the district court is printed in App. at page 49. The district court's order denying Vernon's motion for reconsideration is printed in App. at page 50.

JURISDICTION

The jurisdiction of the district court was invoked pursuant to Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and

Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26. The judgment of the United States Court of Appeals for the Ninth Circuit was filed February 7, 1992. The order of the Court of Appeals denying Vernon's petition for rehearing and suggestion for rehearing en banc was filed on April 21, 1992. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2, in pertinent part provides:

> "Every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony. . . ."

Section 14 of the Clayton Act, 15 U.S.C § 15(a), provides in pertinent part:

> "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . ., and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . . ."

STATEMENT OF THE CASE

Litigation History. Petitioner Vernon, an industrial city in the Los Angeles Basin that buys wholesale power for resale to its retail customers, filed its amended complaint on August 7, 1987, charging Southern California Edison Company ("Edison"), a major electric utility company, with violations of Sections 1[1] and 2 of the Sherman Act, 15 U.S.C. §§ (1), (2), and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26. Vernon's Section 2 claim was based on Edison's refusal to permit Vernon reasonable

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[1]Vernon's Section 1 claims charged Edison with a horizontal combination with its wholesale competitor preventing Vernon from buying wholesale power from Nevada Power Company and Edison's conspiracy with others to prevent Vernon from obtaining any transmission on the power line to the Pacific Northwest (Pacific Intertie) for anticompetitive purposes. Vernon does not seek review of the Court of Appeals' disposition of its Section 1 claims.

access to its essential transmission facilities thereby foreclosing Vernon (its wholesale customer and competitor) from competing with Edison in the relevant markets with the intent to maintain and extend its admitted monopoly power in those markets. Vernon sought damages for its antitrust injury and injunctive relief to prevent Edison's from continuing its exclusionary conduct.

Edison answered and filed a series of motions for partial summary judgment for the purpose of which it conceded that it had monopoly power in all of the relevant wholesale and retail markets, that its transmission system was an essential facility, and that Vernon was its wholesale customer and competitor. Edison contended that it had no antitrust obligation to transmit ("wheel") non-Edison power to Vernon because its transmission lines were "fully utilized,"[2] and, even, if it had excess transmission capacity, it had a legitimate business justification for its conduct because allowing access to transmission would permit Vernon successfully to compete with it in purchasing low-cost wholesale power and thereby could have caused Edison to raise its rates to its retail customers.[3] Edison offered no evidence to prove that it would or could have raised its retail rates if reasonable access had been given to Vernon.

Vernon filed counter-declarations *prima facie* establishing its Section 2 liability case and provided evidence that Edison had excess transmission capacity and that Edison's claimed concern

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[2]Edison's sole evidence to support its full utilization argument was the testimony of one witness who also admitted that Edison considered a transmission line fully utilized unless the line was out of service *and* disconnected. O'Malley Decl. Ex. A, Sept. 17, 1990 (CR 298; ER 831-39).

[3]The predicate for the defense was Edison's attack on one hypothesis in Vernon's damage study, postulating a *de minimus* temporary retail rate increase during the damage period *if* Vernon had been permitted transmission on reasonable terms and conditions, *if* Edison had not responded to competition by becoming more efficient, *if* it had sought a rate increase, and *if* the California Public Utilities Commission ("CPUC") would have approved one. Edison offered no evidence that any of the conditions precedent would have occurred; rather, Edison's own study showed no impact on its retail customers from reasonably sharing transmission with Vernon.

for its retail ratepayers was pretextual.[4] Vernon contended that a monoplist could not assert a valid business justification defense based on its claim that sharing an essential facility with a competitor could create competition adversely affecting it or its other customers. Even if a motivation to protect Edison's retail customers from the results of an outbreak of competition could be a legitimate business defense, Edison's motive was to protect and extend its admitted monopoly power in the relevant markets and not to put a protective arm around its retail ratepayers.[5] Vernon's study quantifying the damages it suffered from Edison's unreasonable foreclosure was admitted in evidence over Edison's objections.[6]

By minute order dated March 1, 1990, the district court granted Edison's motion for partial summary judgment on Vernon's Section 2 Sherman Act claim. On August 30, 1990, the court filed findings of fact and conclusions of law on the Section 2 claim[7] and thereafter granted summary judgment for Edison on

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[4]Vernon produced evidence that Edison uses no more than 75 percent of its transmission for firm power resources (CR 185, ER 535-36), that its local network was unconstrained, that it had significant excess capacity in its long line transmission (La Pierre Foreclosure Declaration 20, 43), and that Edison had an additional 400 megawatt of excess capacity available on its system from simple adjustments in operating procedures. CR 177, ER 249. The Court of Appeals disregarded Vernon's evidence on these points.

[5]Vernon produced evidence that while Edison was unreasonably restricting transmission, it was building new transmission lines that provided no reasonable rate of return, purchasing extravagantly expensive power from some of its unregulated affiliates to the detriment of its ratepayers, and filing rate applications to increase prices to its ratepayers which the CPUC found were unjustified. O'Malley Decl., Ex. F, filed Nov. 14, 1989 (CR 183; ER 414-15); *id.* at Ex. G (ER 417-19); O'Malley Decl., Ex. I, filed Sept. 17, 1990 (CR 298; ER 967). The court ruled that the evidence was insufficient to raise a question of fact about Edison's motives.

[6]RT 19, Mar. 6, 1990 hearing (ER 765).

[7]App. at 25 *et seq.*

all of Vernon's antitrust claims.[8] The district court denied Vernon's motion for reconsideration.[9]

Vernon appealed. On February 7, 1992, the Court of Appeals filed its opinion affirming the district court's summary judgment in all respects other than its denial of injunctive relief with respect to the "generic Intergrated Operations Agreement" ("IOA"), which it remanded to the district court.[10]

Undisputed Facts. The basic facts of electric utility life in California have never been disputed. Major electric utilities, like Edison, are subject to both federal and state regulation. Congress delegated to the Federal Energy Regulatory Commission ("FERC") the regulation of interstate transmission of electricity and rates for wholesale power.[11] Agreements with respect to interstate transmission must be filed by Edison with FERC, and changes in rates (tariffs) must likewise be filed by Edison and FERC. The California Public Utilities Commission ("CPUC") regulates Edison's retail rates and has been delegated power to regulate proposed mergers of California public utility companies.[12] Neither FERC nor CPUC has been delegated power to enforce federal antitrust laws, but both are required to take into account anticompetitive consequences in deciding whether appli-

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[8]The district court *sua sponte* granted summary judgment on Vernon's § 1 claim that Edison had conspired with others to prevent its having access to the Pacific Intertie; Vernon was given no opportunity to present any evidence in opposition to the court's summary disposition of that claim.

[9]App. at 50.

[10]Until Edison filed its generic IOA, it foreclosed any access to firm transmission. The Federal Energy Regulatory Commission ("FERC") ultimately invalidated as unjust and unreasonable several of the terms of the IOA. *Southern California Edison Co.*, 39 FERC ¶ 63,045 (1987) *aff'd in part and rev'd in non-pertinent part*, 55 FERC ¶ 61,074 (1991); *Southern California Edison Co.*, 41 FERC ¶ 61,188 (1987), *reaff'd on rehearing*, 52 FERC ¶ 61,299 (1990), *petition for review dismissed* (1991) (unpublished order, App. at 52).

[11]The Federal Power Act, 16 U.S.C. §§ 791 *et seq.*

[12]Cal. Pub. Utilities Code § 854.

cations for changes in rates or structures of electric utility companies are in the public interest.[13]

For many years locally generated power has been inadequate to meet the demands for electricity in the heavily populated areas of the State. The major electric utility companies in California (Edison, San Diego Gas & Electric Company, and Pacific Gas & Electric Company) therefore buy and import power from the remote power hubs in the Pacific Northwest and Southwest where large quantities of power are generated.[14]

Edison's transmission system consists of an "integrated network" (220 kV facilities and related 500 kV lines) that crisscrosses the Los Angeles Basin to connect Edison with its customers and other electric utilities and its long-line extra high voltage ("EHV") import lines that transport bulk power from remote sources for delivery to its integrated network.[15] Edison's dispatchers buy, sell, and transmit bulk power minute-by-minute around the clock.[16]

Vernon generates a small amount of the power it sells to its retail customers within the City. Its remaining needs must be

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[13]*E.g., Gulf States Utilities Co. v. Federal Power Comm'n*, 411 U.S. 747 (1973); *Federal Power Comm'n v. Conway Corp.*, 426 U.S. 271 (1976).

[14]Koehn Decl., para 23, filed Nov. 16, 1989 (CR 185; ER 538-39).

[15]Edison ownes or has entitlement to transmission lines from the Pacific Northwest (the Pacific Interie), from Mead/Eldorado (Colorado River hydro-generation and coal-fired generation), from the Southwest (the Eldorado-Moenkopi-Four Corners line) and from the Devers-Palo Verde line (nuclear fuel generation). The line from the Colorado River to the Eldorado substation in Las Vegas is owned exclusively by Edison. Koehn Decl., *supra*, n. 7 at paras. 17-19.

[16]La Pierre Foreclosure Reply Decl., Ex. 41-42.

Transmission can be and is bought and sold separately from the power transmitted over it. *Utah Power & Light Co.*, 45 FERC ¶ 61,095 at 61,284 (1986). Transmission is sold as either "firm" or "interruptible." "Firm" transmission guarantees the purchaser the use of transmission unless there is a physical outage or a system emergency. "Interruptible" transmission is offered on an "as available" basis subject to curtailment under specified conditions.

purchased from others for resale to its retail customers. Vernon cannot buy one kilowatt of power from any non-Edison source without access to some part of Edison's transmission system. (Edison's wholesale tariffs prohibits Vernon from directly interconnecting with any other utility.[17]) In conceding that its transmission system was an essential facility, Edison necessarily also conceded that Vernon cannot compete with it in buying power from bulk powers vendors in the regional hub markets and those vendors cannot compete with Edison to sell to Vernon without access to Edison's transmission system.

Vernon's lengthy battles to obtain access to third party sources allowing it to compete with Edison were well documented. Vernon and the other cities in Edison's control area buying wholesale power for resale to their retail customers ("Resale Cities") were Edison's captive customers for all of their requirements until after some of the Resale Cities filed antitrust charges against it before federal regulatory agencies.

To settle the antitrust issues, Edison agreed in 1972 to provide its Resale Cities with a tariff by which they could purchase power from others and could use the power they generated themselves on reasonable terms.[18] Years later, Edison finally offered the "generic" IOA permitting highly restricted access to its integrated network (but none on Edison's EHV import lines) and allowing (at times of its own choosing) "capacity credits" for some non-Edison power resources.[19] Without capacity credits,

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[17]La Pierre Foreclosure Reply Decl., *supra*, n. 16; Koehn Decl., *supra*, n. 14, at para. 25.

[18]*Southern California Edison Co.*, 49 FPC 717 (1973).

[19]A "capacity credit" is a reduction of the price that a Resale City must pay Edison which takes into account power bought from non-Edison sources. Edison's rates to its wholesale customers included an "energy charge" for the amount of energy actually used by the customer and a "demand charge" representing the amount of generating facilities that Edison must maintain to serve the customer's demand for power. (Ferguson Decl., paras. 5, 7, filed Aug. 14, 1989 (CR 130; ER 42-43).) Until 1979, Edison's partial requirements rate filed with FERC required a Resale City to pay Edison a demand charge for each kilowatt of demand on the resale system whether Edison supplied the kilowatt or not. Capacity credits reduce the amount of the demand charge.

Resale Cities buying wholesale power receive no economic benefit from third party purchases or for power generated themselves. The Resale Cities, other than Vernon, signed the generic IOA in 1977. Vernon refused because the terms were unreasonable and the agreement provided no way for a Resale City to import power from others for peak usage periods ("peaking power") on a practicable basis.[20] Vernon challenged the unreasonable terms of the generic IOA before FERC in 1980, and FERC invalidated a number of them.[21]

To remove from the FERC litigation Vernon's challenge to the generic IOA based on peaking power deficiencies, Edison entered into an agreement with Vernon in 1983 promising to file a tariff with FERC allowing Resale Cities to acquire peaking resources from others on an economical basis.[22] Edison again delayed filing the necessary tariff (Special Condition 12, "SC-12") with FERC until January 1, 1987. Edison permitted no firm transmission to any Resale City for non-Edison power until it filed the generic IOA on terms that FERC invalidated. Until Edison filed SC-12, it removed none of the unreasonable terms of the IOA. Edison

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[20]A utility needs baseload power to service the system at its point of lowest demand. Peaking power is used to meet temporary demands in excess of the baseload requirement.

[21]Other Resale Cities thereafter joined Vernon in the ensuing lengthy litigation over the reasonableness of the terms of the generic IOA. In 1991, FERC's invalidation of those terms became final when the Court of Appeals for the District of Columbia Circuit dismissed Edison's petition to review the agency's decision. *Southern California Edison Co., supra*, n. 10.

Although Vernon never accepted the generic IOA, it signed a different IOA limited to its obtaining some transmission on Edison's local network for its entitlement to power generated by the Palo Verde Nuclear Generating Station. Edison knew that Vernon refused to sign the restricted IOA, despite its unreasonable terms, Vernon's multimullion investment in Palo Verde would have been worthless. O'Malley Decl., Exs. P, U, filed Nov. 28, 1989 (CR 193; ER 585, 712); *id.* at Ex. FF (ER 725). Edison refused to permit any transmission for Vernon's Palo Verde power on its direct long EHV line. Brearley Decl., paras. 4, 5, filed Nov. 29, 1989 (CR 211, ER 744).

[22]*Southern California Edison Co., supra*, n. 10.

has yet to file a tariff that cures the other deficiencies that FERC has found in the IOA.

Vernon produced abundant evidence of Edison's repeated refusals to provide transmission for Vernon's purchases or potential purchases of power from non-Edison sources and its inexcusable interruptions of the limited transmission it permitted.[23] With the exception of Hoover/Mead, Edison has always refused to grant Vernon any firm access to its EHV lines to reach any of the bulk power markets in the Southwest or Pacific Northwest. With the exeption of Vernon's Hoover/Mead and Palo Verde entitlement, Edison has permitted transmission solely on its integrated network (220 kV grid) on a short-term basis.

The District Court's Decision. The district court held: (1) Edison had no antitrust duty to share its transmission facilities with Vernon because a monopolist has "no generalized duty to extend a helping hand to its competititors"[24]; (2) even if a duty existed to share transmission with Vernon, Edison had a valid business justification for restricting or entirely foreclosing access because sharing transmission would allow Vernon to compete successfully with Edison in buying low-cost wholesale power thereby potentially increasing the prices that Edison was charging to its other customers;[25] (3) Vernon's evidence of Edison's conduct antithetical to the interests of its ratepayers (while at the same time using its monopoly power to prevent Vernon from competing with it) and its long history of exclusionary conduct were insufficient as a matter of law to create a triable issue of fact

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[23]*E.g.*, Edison interrupted transmission of non-firm energy flowing from Nevada Power to Vernon so often that Nevada Power was unable to perform its contract to deliver power to Vernon.

[24]Findings of Fact and Conclusions of Law, App. at 45.

[25]"Reasonable access does not include that which would harm Edison's other customers . . . ." App. at 42. "Edison is not obligated by the antitrust laws to confer a benefit on Vernon at the expense of its own customers." App. at 43. "Edison's denial of access to its transmission system was motivated by a desire to benefit its own customers rather than just Vernon. This is a legitimate business justification." App. at 43. "As a matter of law, Edison's conduct with respect to transmission has not been unreasonably exclusionary." App. at 44.

with respect to pretextuality.[26] The court disregarded Edison's failure to offer evidence of any efficiency justification for its competitive restraints or any pro-competitive consequences therefrom.

The Court of Appeals Decision. The Court of Appeals held: (1) Edison was not required by Section 2 of the Sherman Act to share its transmission system with Vernon because Edison was using the system and because Edison's retail customers could have had to pay higher rates if Edison permitted Vernon to compete with it in buying low cost power.[27] Like the district court, the Court of Appeals disregarded the lack of any efficiency gains or competitive justification for Edison's conduct. Without discussion, the Court affirmed the district court's conclusion that Vernon's evidence of pretextuality was insufficient as a matter of

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[26]"Vernon failed to submit any facts sufficient to controvert or to raise a factual dispute underlying the issue of legitimate business justification." App. at 38. The court did not say why Vernon's evidence of pretextuality was insufficient.

[27]"It is legitimate for Edision to refuse access that will affect its rates to the detriment of its customers. See *City of Anaheim*, at 1381." *City of Vernon*, 955 F.2d 1361, 1366, App. at 10. (The court's reference is to *City of Anaheim v. Southern California Edison Co.*, 955 F.2d 1373, 1381, handed down the same day as the opinion in *Vernon* by the same panel; that case was fully tried by the district court sitting without a jury and the district court found as a fact that the particular transmission line to which the Cities sought access was not an essential facility. The district judge who decided *Vernon* was the same judge who had earlier tried *City of Anaheim*.)

"Vernon fails to demonstrate just why Edison is required to cease using its own facility so that Vernon can begin using it." 955 F.2d at 1366, App. at 10. Citing *City of Anaheim, supra*, the court also said: "The demand that Edison turn over its facility to a city simply because the city could save money by obtaining cheaper power stands the essential facility doctrine on its head." *City of Vernon*, 955 F.2d at 1367, App. at 11.

Like the lower court, the Circuit disregarded Vernon's evidence that Edison had excess transmission capacity available for both firm and interruptible transmission; *i.e.*, it had idle lines, as Edison's own witness conceded.

law.[28] (2) Vernon produced no evidence of damages because its damage study used pro rata access ("relative size share") as an acceptable method of quantifying reasonable access to compute damages and that assumption was erroneous as a matter of law.[29]

According to the opinion, Edison would have been justified in completely foreclosing Vernon's access to transmission because Edison had "a use" for its lines; Vernon had no cause for antitrust complaint as long as Edison was willing to supply its energy requirements at Edison's prices;[30] and Vernon had the burden of proving Edison's lack of business justification which it failed to do.

Regulatory Agency Decisions. After judgment in the district court and during the pendency of Vernon's appeal, the FERC

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[28]*City of Vernon*, 955 F.2d at 1366, App. at 10.

[29][N]o authority . . . supports Vernon's theory that 'reasonable' access to Edison's facilities must take the form of relative size share access." *Id.* at 1367, App. at 11. "Vernon's deeply flawed study is the handmaiden of its equally flawed theory that it should have proportionate firm access to Edison's whole system at all times." *Id.* at 1372, App. at 21. The court disregarded the fact that Vernon did not contend that relative size share access was the only means of quantifying reasonable access; Vernon contended that relative size share is one of the acceptable means for doing so, and Edison offered no other. Edison conceded that the question whether it would have agreed to a formal demand for pro rata access was triable.

[30]"This is not a situation where Edison had no use for the facility and arbitrarily denied someone else its use. . . . Nor is it case where Edison simply refused to supply Vernon with it power needs. . . . Edison clearly had a use for its lines. As we pointed out in *City of Anaheim*, at 1380-81, the demand that Edison turn over its facility to a city simply because the city could save money by obtaining cheaper power stands the essential facility doctrine on its head." *City of Vernon*, 955 F.2d at 1366-67, App. at 10. The court disregarded Vernon's evidence that Edison had excess transmission capacity.

"Although the defendant generally has the burden of coming forward with a legitimate business justification after the plaintiff has shown evidence of monopolistic intent, the plaintiff in this case, Vernon, ultimately has the burden of proving that the defendant acted without a legitimate business justification." *Id.* at 1366, App. at 10.

decision invalidating several provisions of the generic IOA became final when the District of Columbia Circuit dismissed Edison's petition for review in 1991.[31] During the same period, the CPUC's decision denying the application of Edison's parent corporation to merge Edison with the San Diego Gas & Electric Company became final.[32] The CPUC found that Edison "used its transmission dominance to undercut the cities' efforts to lower costs to their retail customers," and it concluded that "Edison has used its strategic control over transmission to the competitive disadvantage of other utilities, who are buyers and sellers in the relevant interregional transmission markets and in the network transmission market."[33]

REASONS FOR GRANTING THE WRIT

Introduction. Efficient generation, transmission and distribution of electricity are vital to the Nation's economic health. To reach the national goals of efficiency in the industry, enhancement of generation capacity, and lower prices for energy, competition is essential, as Congress and the regulatory agencies have agreed. The Ninth Circuit has not.

If the Ninth Circuit's decision is permitted to stand, it will have grave effects on competition in the electric utility industry and thus on the economy. That court has created a new business justification defense by holding that a vertically integrated electric utility can foreclose access to its essential transmission system if the utility has some use for its lines (even if its "use" is keeping the lines unloaded), or if selling transmission to a competitor could adversely affect its price levels to its own customers. In

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[31] *Southern California Edison Co., supra*, n. 10. The unpublished order of dismissal is printed App. at p. 52.

[32] *In the Matter of the Application of Southern California Edison and its public utility subsidiary Southern California Edison Company and San Diego Gas & Electric Company for Authority to Merge San Diego Gas & Electric Company into Southern California Edison Company*, 122 PUR 4th 225 (1991) (hereafter "*CPUC Merger Case*"). Relevant portions of this extremely long opinion are printed in App. at 73 *et seq.*

[33] *CPUC Merger Case, supra* note, 30 122 PUR 4th at 258, App. at 78, 78. These final decisions of FERC and CPUC collaterally estop Edison.

reaching its extraordinary conclusions, the Ninth Circuit is in conflict with the decisions of this Court, of other circuits, and of regulatory agencies enforcing the economic policies mandated by Congress.

The major utility companies, like Edison, are no longer local monopolies, generating all of the power delivered to local requirements customers. Instead, there are mega-utilities, buying and selling transmission and bulk power among themselves and from competitors transnationally and internationally.[34] The impact of the decision is thus far beyond its effect on a small industrial city by insulating major utilities from anticompetitive conduct, the Circuit has created an implied repeal of the antitrust laws applicable to electric utilities and has thereby prevented major utilities' wholesale customers and their retail customers from receiving the benefits that would otherwise flow to them from competition.

I.

THE NINTH CIRCUIT'S HOLDING THAT A MONOPOLIST CAN IMMUNIZE ITSELF FROM LIABILITY FOR ANTICOMPETITIVE CONDUCT BECAUSE COMPETITION WOULD ADVERSELY AFFECT ITSELF OR ITS CUSTOMERS IS CONTRARY TO OPINIONS OF THIS COURT, TO THOSE OF OTHER CIRCUITS, AND TO NATIONAL ANTITRUST POLICY MANDATED BY CONGRESS

A. The Decision Conflicts with Controlling Decisions of this Court

Protecting a monopolist or its customers from potential adverse affects of competition has never been accepted by this Court as a valid business justification for anticompetitive conduct. Nor has the Court sustained a business justification defense when an antitrust defendant has failed to produce evidence that its exclu-

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[34]One-third all electricity sold by investor owned electric utilities to ultimate consumers is purchased from other sources. High voltage transmission has grown nationally from 22,000 circuit miles in 1960 to 130,000 circuit miles in 1990. *Public Service Co. of Indiana,* 51 FERC ¶ 61,367 at 62,224 (1990).

sionary conduct had any procompetitive effects, any efficiency gains, or a benefit to anyone other than its stockholders and, possibly, a slight short-term benefit to its retail customers.[35]

Vernon established its *prima facie* Section 2 liability case: Edison had monopoly power in the relevant wholesale and retail markets; Vernon was Edison's wholesale customer and competitor;[36] access to Edison's transmission system was essential to competition in those markets; Edison refused to permit Vernon reasonable access to transmission; and Vernon sustained antitrust injury therefrom. Vernon also produced evidence that Edison had excess transmission capacity, and, on appeal, Edison conceded that wheeling non-Edison wholesale power to Vernon would not have increased the burden on its transmission system.[37]

Maintaining price levels is not a valid business justification for anticompetitive conduct. "Price is the 'central nervous system of the economy' ", *National Society of Professional Engineers v.*

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[35]Under rate regulation, some of a monopolist's rents are not retained by its stockholders, but are required to flow to its customers. The Ninth Circuit held that the monopolist's customers cannnot be deprived of any part of this "benefit" by permitting competition.

[36]In 1987, Edison's CEO admitted that its Resale Cities' utility systems (including Vernon's) were likely takeover targets. O'Malley Decl. in Support of Franchise Summary Judgment, at 326-28.

[37]"There may have been 'no burden' on the 'system,' but there clearly would have been the burden of increase costs on Edison's other customers." Edison's responding brief, at 26. It could not have avoided the concession because Edison's system adequately accommodated the requirements of all of its retail customers and all of the Resale Cities when they were full requirements customers. That fact, alone, was enough to raise a triable issue about the capacity of Edison's system to sell transmission to Vernon. *Delaware & Hudson Ry. Co. v. Consolidated Rail Corp.*, 902 F.2d 174, 179 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 204 (1991) (feasibility of access to defendant's railroad demonstrated by fact that railroad permitted continuous use of its tracks to plaintiff until access was restricted). Moreover, the *CPUC Merger Case* decided that Edison's system had ample capacity to accommodate its own customers and that of the Resale Cities for non-Edison purchases. App. at 76-77. The decision is final and collaterally estops Edison from claiming otherwise.

United States, 435 U.S. 679, 692 (1978), and competition is the lifeblood of a free market economy.

The Ninth Circuit's holding that Edison was justified in denying access to transmission to prevent competition from disturbing its rates to its retail customers is contrary to the teaching of *National Society of Professional Engineers* and its predecessors. In that case, the defendant was charged with violating Section 1 of the Sherman Act by its ethical rule prohibiting competitive bidding by its members; defendant argued that the rule was justified to minimize the risk that competition would produce inferior engineering thereby endangering public safety. The Court recognized that the logic of the rule was to protect the price level. Flatly rejecting the defendant's contention, the Court said that the defense was "nothing less than a frontal assault on the basic policy of the Sherman Act." 435 U.S. at 695. The Court said:

> "The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain — quality, service, safety and durability — and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad." *Ibid.*[38]

The principles applied in *National Society of Professional Engineers* repeat those stated in *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911), and *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

Contrary to the Ninth Circuit, anticompetitive conduct is not justified to maintain the prices the defendant charges its customers, and such conduct is not immunized or exempted because the actor is a public utility that lawfully obtained its monopoly power. As this Court held in *United States v. Griffith*, 334 U.S. 100, 107 (1948), "the use of monopoly power, however lawfully acquired,

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[38]Although this was § 1 case, the same principles apply to a § 2 case. *E.g., Lorain Journal Co. v. United States*, 342 U.S. 143, 154 (1951) (anticompetitive acts forbidden by § 1 when done by a combination are also violations of § 2 when done by a monopolist).

to foreclose competition, to gain a competitive advantage or to destroy a competitor", is an abuse of monopoly power under the Sherman Act.[39]

A monopolist's exclusionary conduct is not excused because its customer-competitor can still buy the monopolist's products. Under *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) and *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912), Edison had an affirmative antitrust duty to provide Vernon reasonable access to its essential transmission system. The Ninth Circuit gave two reasons for relieving Edison of its duty: (1) "Edison clearly had a use for its lines"; "[t]his is not a situation where Edison had no use for the facility and arbitrarily denied someone else its use"; and (2) "[n]or is it a case where Edison simply refused to supply Vernon with its power needs. *See Otter Tail Power Co. v. United States*, 410 U.S. 366."[40]

In reaching its second conclusion, the court assumes that transmission could not be essential to Vernon if it could continue to buy power from Edison at non-market prices. It is that assumption that turns *Otter Tail* upsidedown because the rationale for requiring a monopolist to share an essential facility is not to preserve the competitor's access to the monopolist's products,

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[39]Although *Griffith* was overruled on other grounds in *Copperweld Corp. v. Independent Tube Corp.*, 467 U.S. 752 (1984), its continued vitality on this point has been repeatedly reaffirmed. *E.g.*, *Eastman Kodak Co. v. Image Technical Serv. Inc.*, 60 U.S.L.W. 4465, 4474 (1992); *Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, 472 U.S. 585, 600-05 (1985); *Lorain Journal Co. v. United States, supra*, 342 U.S. at 154.

[40]*City of Vernon, supra*, 955 F.2d at 1366-67, App. at 10. In reaching those conclusions, the court disregarded Vernon's evidence that Edison had excess transmission capacity after it fulfilled all of its own needs together with the transmission that Vernon sought to buy. Thereby, the court violated the controlling decisions of this Court that, on summary judgment, " '[t]he evidence of [the party opposing summary judgment] is to be believed, and all justifiable inferences are to be drawn in [their] favor.' " *Eastman Kodak Co., supra*, 60 U.S.L.W. at 4466, (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). [First bracket phrase added; second bracket by Court.]

but to preserve competition in the relevant markets. The antitrust laws protect competition, not competitors, and Edison's exclusionary conduct created the very harm to the competitive process that the antitrust laws were intended to prevent thereby causing Vernon antitrust injury. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

This Court has never relieved a monopolist controlling a facility essential to competition from a duty to share it fairly with a competitor because the defendant had some use for the facility or because a monopolist was willing to continue to sell its products to a competitor.[41] If the Circuit's extraordinary conclusion is permitted to stand, it effectively eliminates competition between cities and monopolistic utilities in the relevant power markets. What monopolist would sell transmission to a customer-competitor if it could insulate itself from antitrust liability for excluding access merely by continuing to bundle transmission with power and selling the bundle to the same customers and would-be competitors at the same prices?

No business justification exists when anticompetitive conduct provides no efficiency gains and no pro-competitive effects. Because *Otter Tail* and *Terminal R.R.* require Edison to provide Vernon reasonable access to transmission, Edison had the "heavy burden of establishing an affirmative defense which competitively justifies [its] apparent deviation from the operations of a free market." *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 113 (1984). Edison could not meet that burden without proving that the "anticompetitive effects of [its] behavior are outweighed by its competitive effects." *Eastman Kodak Co. v.*

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[41]In *Otter Tail*, the utility's lines were every bit as much in use as were Edison's; nothing in *Otter Tail* suggests that the Court's conclusion would have been different if that utility was willing to sell power at the same prices to its captive customer-competitors. Like Edison, the utility in *Otter Tail* refused to unbundle transmission from wholesale power. *Compare United States v. Terminal R.R. Ass'n, supra*, 224 U.S. 383 (railroad consortium owning railroad bridges essential to reach St. Louis that denied rival railroads access to the bridges was required to share the bridges fairly although the owners were unquestionably using the bridges themselves).

Image Technical Serv., Inc., supra, 60 U.S.L.W. at 4475. It offered no evidence of any procompetitive effects of its exclusionary conduct.

In determining whether anticompetitive conduct is unreasonably exclusionary, a court must consider not only the impact of the conduct on the monopolist and its customers, but also the impact on the competitor and the competitor's customers. *Aspen Skiing Co. v. Aspen Highland Skiing Corp., supra*, 472 U.S. at 605. Edison's conduct injured Vernon and its retail customers even if it were correct that foreclosing access to transmission was a "benefit" to Edison's own retail customers.

Like *Aspen Skiing*, Edison chose to forego short-term benefits (selling excess transmission capacity to Vernon) in favor of its long-term objective (restraining competition in the relevant markets to maintain its pricing levels at the expense of Vernon, other Retail Cities, and their retail customers). Edison's conduct is deemed predatory because it was thereby " 'attempting to exclude rivals on some basis other than efficiency.' " *Aspen Skiing Co. v. Aspen Highland Skiing Corp., supra*, 472 U.S. at 605. Edison offered no evidence of any efficiency gains from its competitive restraints; for reasons stated in *Otter Tail*, it could not have done so.

In *Otter Tail*, an electric utility refused to wheel power to cities that had formerly been its captive customers when the cities sought to buy lower cost power from others. Explaining why threatened destruction of the utility's business was not a valid justification for its conduct, the Court said:

> "That [Sherman] Act assumes that an enterprise will protect itself against loss by operating with superior service, lower costs, and improved efficiency. Otter Tail's theory collided with the Sherman Act as it sought to substitute for competition anticompetitive uses of its dominant economic power." 410 U.S. at 380.

As the Court held in *National Society of Professional Engineers*, antitrust defendants are not insulated from liability because competition is "bad" for the defendant's customers or constituents. For example, in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), the City argued that it should be immunized from its anticompetitive conduct because competition would increase the cost to its constituents and that it should be

exempt from the antitrust laws because it was motivated by an interest in its citizenry, rather than in private profit. The Court rejected both arguments. The Court explained that even if the anticompetitive activities provide the maximum benefits for the City's constituents, that fact could not provide an antitrust defense.[42] If increased costs to constituents were a business justification, joint purchasing agreements would be legal *per se*, and antitrust exemptions for agricultural cooperatives provided by the Capper-Volstead Act would be unnecessary, and they are not.

The Ninth Circuit's decision permits monopoly to beget monopoly. Edison used its transmission monopoly to maintain and extend its monopoly power in the relevant markets — conduct long condemned as a violation of Section 2 of the Sherman Act. Thus in *Lorain Journal Co.*, 342 U.S. 143, defendant newspaper with monopoly power over local advertising, refused to accept advertising from those who advertised on a local radio station, thereby impairing the station's ability to compete with it. Although the Sherman Act does not impose a general duty to deal, refusals to deal in the face of an affirmative duty to do so or refusals for the purpose of creating or maintaining a monopoly

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[42]See discussion, *infra*, pp. 21-23. On the same reasoning, other circuits have refused to excuse anticompetitive conduct because impairing competition protected the defendant, its customers, or promoted the public good. *E.g.*, *Pennsylvania Water & Power Co. v. Consolidated Gas, Elec. L.&P. Co.*, 184 F.2d 552, 559 (4th Cir.) 340 U.S. 906 (1950) (rejecting utility's argument that territorial constraints on competition were justified because permitted utilities to operate efficiently for the benefit of the public: "Congress has determined that the greater good is served by the maintenance of competition and its decision in the field of interstate commerce must control"), *cert. denied*, 340 U.S. 906 (1950); *Northern Natural Gas Co. v. Federal Power Comm'n*, 399 F.2d 953, 970 (D.C. Cir. 1968) (rejecting utility's justification of anticompetitive conduct to protect costs to its customers); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977) (judgment for defendant owner of professional sports stadium reversed because jury erroneously instructed that it could take into account defendant's promotion of its self-interest), *cert. denied*, 436 U.S. 956 (1978).

"violates the 'attempt to monopolize' clause of § 2.' "[43] 342 U.S. at 154.

Edison's manifest purpose in refusing to sell transmission was to destroy threatened competition between itself and Vernon and to use its strategic dominance of transmission to impair or destroy competition between it and rival wholesale power vendors in the relevant markets. By entirely foreclosing or inexcuseably interrupting transmission from non-Edison vendors, such as Nevada Power Co., Edison forced Vernon to buy bundled power and transmission from it thereby maintaining Edison's monopoly power, its price levels, and its market share. Edison's conduct was a forbidden abuse of monopoly power as this Court concluded in *Otter Tail, Lorain Journal*, and *Terminal Railroad*.[44] In excusing Edison's abuse of its monopoly power, the Circuit failed to heed this Court's warnings in *Griffith*: "If monopoly power can be used to beget monopoly, the [Sherman] Act becomes a feeble instrument indeed." 334 U.S. at 108.

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[43]The *Lorain* principles have long been accepted by the Court. *E.g., Associated Press v. United States*, 326 U.S. 1 (1934); *Indiana Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co.*, 293 U.S. 268 (1934); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927).

[44]Circuits, other than the Ninth, have reached similar conclusions for the same and other reasons. *E.g., Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979) ("the use of monopoly power attained in one market to gain a competitive advantage in another is a violation of § 2"), *cert. denied*, 444 U.S. 1093 (1980); *Key Enterprises of Delaware, Inc. v. Venice Hospital*, 919 F.2d 1550, 1556-68 (11th Cir. 1990) (applying principles of *Berkey*); *Kerasotes Mich. Theaters v. National Amusements, Inc.*, 854 F.2d 135, 136-37 (6th Cir. 1988), *cert. dismissed*, 490 U.S. 1087 (1989) (same); *Poster Exchange, Inc. v. National Screen Service Corp.*, 431 F.2d 334 (5th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971) (monopolist abused monopoly power by intentionally using that power at the manufacturing level to eliminate the plaintiff as a competitor at the distributor-jobber level); *MCI Communications Corp. v. American T.&T. Co.*, 708 F.2d 1081, 1144 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

B. The Ninth Circuit Decision Conflicts with the Decisions of Other Circuits

Other circuits have faithfully followed this Court's decisions requiring the owner of an essential facility to share it fairly with competitors and refusing to excuse exclusionary conduct because competition could hurt the antitrust defendant and possibly its customers.[45]

In *MCI Communications Corp., supra,* 708 F.2d 1081, the court affirmed AT&T's liability for violating Section 2 of the Sherman Act by refusing to connect MCI, its competitor in long distance transmission, with AT&T's local monopoly. AT&T's local network was held adequate to supply MCI access even though AT&T obviously could not simultaneously use its local network to transmit its own long distance calls when, for the moment, a residential line was being used to connect a residential

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[45] *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509 (10th Cir. 1984) (applying essential facilities doctrine to uphold antitrust liability for exclusionary conduct impairing competition by its rival), *aff'd on other grounds, supra,* 472 U.S. 585; *Southern Pacific Communications Co. v. American Tel. & Tel.*, 740 F.2d 980 (D.C. Cir. 1984) (specialized inner city telephone carrier proved *prima facie* antitrust liability by AT&T's anticompetitive practices with respect to interconnection; AT&T's defeated liability by establishing its regulatory justification defense after full trial); *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986) (defendant's refusal to lease sports stadium to plaintiff, essential to plaintiff's acquiring basketball franchise, proved *prima facie* antitrust liability, and defendant's claim that plaintiff was financially irresponsible was pretextual); *Hecht v. Pro-Football, Inc., supra,* 570 F.2d 982 (denial of access to sports stadium); *Gamco Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir.), (refusal fairly to share building essential to competition in wholesale produce market violated § 2 of the Sherman Act even though space was occupied by others), *cert. denied*, 344 U.S. 817 (1952). *But see City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641 (10th Cir. 1992) (gas line owners could foreclose access to competitors for owners' profit), *cert. petition pending,* ____ U.S. ____ (1992).

customer with MCI's long distance service.[46] That fact did not relieve AT&T of its duty to share transmission fairly with MCI.

The liability holding in *MCI Communications* cannot be distinguished from this case.[47] Like Edison, AT&T had enough capacity to supply reasonable access to its competitor without impairing its ability adequately to serve its own customers. Edison was no more asked by Vernon to cease using its facilities for Vernon's benefit, than AT&T was required to cease using its own facilities for MCI's benefit. Like telephone service, electric power is bought, sold and transmitted minute by minute.

The Second Circuit reached similar conclusions in *Delaware & Hudson Ry. Co.*, *supra*, 902 F.2d 174. Plaintiff was a relatively small rail carrier seeking to compete with the defendant in the carriage of newsprint from eastern Canada to the mid-Atlantic states. Defendant controlled the short-haul tracks that plaintiff needed to be able to compete in that market. Although defendant did not absolutely refuse to supply plaintiff with the line, it offered to do so only on unreasonable terms. The Second Circuit reversed summary judgment for the defendant. Unreasonable restriction of access need not be total in order to find that access has been unreasonably restrained: "[i]t is sufficient if the terms of the offer to deal are unreasonable." *Id.* at 179-80. The reasonableness of the terms upon which access was permitted is an issue of fact for

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[46]The Seventh Circuit also held that questions relating to the reasonableness of the restrictions that AT&T imposed on MCI and its motivations for its conduct were properly left to a jury. That court reversed and remanded for a new trial solely on the issue of damages.

[47]The Ninth Circuit unsuccessfully tried to do so stating: "This is not a situation where Edison had no use for the facility and arbitrarily denied someone else its use. *See MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1133 (7th Cir.) (AT&T was not asked to abandon its facilities; no business reason shown for refusal), *cert. denied*, 464 U.S. 891 . . . ." *City of Vernon*, 955 F.2d at 1366-67, App. at 10.

a jury.[48] The defendant could not justify its anticompetitive conduct simply because that conduct also provided it with short-term profits.

In *City of Mishawaka v. American Elec. Power Co., Inc.*, 616 F.2d 976, 981 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981), the court rejected the utility's argument that its anticompetitive conduct was justified to protect its customers from adverse consequences of competition: "Expressed preference in favor ot its own retail customers" is evidence of "a specific intent to capitalize on and increase its monopoly power at the expense of the municipalities."

C. The Ninth Circuit's Decision is Contrary to Congressional Mandates

Congress established that competition is the Nation's basic economic policy when it enacted the Sherman Act. Its intention has thereafter been explicitly stated that regulated public utilities are subject to the antitrust laws; *e.g.*, the Federal Power Act, 16 U.S.C. § 2603, provides: "Nothing in this Act or in any amendment made by this Act affects . . . the applicability of the antitrust laws to any electric utility."[49] As this Court said in *Otter Tail*, part II of the Federal Power Act "indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest." 410 U.S. at 378.

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[48]FERC has found that terms of the generic IOA were unreasonable and that decision collaterally estops Edison. *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966) (final adjudicatory agency decisions have the force of judgments).

[49]The legislative history of the Federal Power Act, as amended, reinforces that intent. "The conferees specifically intend to preserve jurisdiction of Federal and State Courts to resolve, independent of the Commission, such actions, including for example, cases where a refusal to wheel electric energy is alleged to be in violation of such laws. . . . . [T]he courts have jurisdiction to proceed with antitrust cases without deferring to the Commission for exercise of primary jurisdiction." H.R. Rep. No. 95-1750 (Conf. Rep. on H.R. 4018), 95th Cong., 2d Sess. 6, *reprinted in 1978 U.S. Code Cong. & Admin. News* 7797, 7802.

Congress has repeatedly rebuffed utilities' efforts to obtain antitrust sanctuary since 1914 when it was considering legislation that became the Clayton Act. Since then it has required the regulatory agencies to consider antitrust implications in reaching their decisions even when the agencies, such as FERC and CPUC, have not been given power directly to enforce the antitrust laws.[50]

Following the Congressional mandates and the teachings of this Court, the regulatory agencies have repeatedly examined the anticompetitive effects of actions or proposed actions by electric utilities in deciding the regulatory issues before them, and they have stressed the value of competition in the electric utility industry.[51] As FERC said in *Gulf States Utilities Co.*, 5 FERC ¶ 61,066 at 61,098 (1978):

> "It is axiomatic that competition creates pressure on electric utilities to reduce their costs and increase their efficiency and power supply production and marketing. This downward pressure on costs supports our direct regulation of rates to the ultimate benefit of consumers of electricity."

FERC recognizes that increasing competitive pressures not only increases efficiency in the industry, but also encourages vitally needed competition to increase the generation of power for

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[50] *E.g., Hearings on Trust Legislation before House Committee on the Judiciary*, 63d Cong., 2d Sess., at 1825 (1914). Section 105(c) of the Atomic Energy Act of 1954, as amended in 1970, recites that "[n]othing contained in this Act shall relieve any person from the operation of the following acts, as amended," citing the Sherman Act, the Clayton Act, and the act creating the Federal Trade Commission. One of the purposes stated for the enactment of the Department of Energy Organization Act, 42 U.S.C. § 7112, is "to foster and assure competition among parties engaged in the supply of energy and fuels."

[51] *City of Huntingburg v. FPC*, 498 F.2d 778 (D.C. Cir. 1974) (directed FERC to consider whether interconnection contained competitive restraints); *Florida Power & Light*, 8 FERC para. 61,121 (1979) (anticompetitive consequences considered in reviewing wholesale rates); *CPUC Merger Case*, App. at 73.

national consumption; therefore, FERC has strongly urged increased access to transmission because competition in the generation market cannot successfully emerge without access to transmission to wholesale markets.[52]

By effectively immunizing Edison from antitrust liability, the Ninth Circuit has eliminated antitrust pressure to compel Edison and other major utilities to grant reasonable transmission access. The result is to thwart the will of Congress, consistently enforced by this Court, to subject regulated electric utilities to the antitrust laws.

II.

CONTRARY TO THE NINTH CIRCUIT, PRO RATA SHARING OF TRANSMISSION LINES IS AN ACCEPTED METHOD OF QUANTIFYING REASONABLE TRANSMISSION ACCESS

The Ninth Circuit held that summary judgment on Vernon's Section 2 damage claims was proper because its damage study assumed that pro rata sharing of transmission ("relative size share") was an appropriate method for quantifying reasonable access and that assumption was erroneous as a matter of law thereby destroying Vernon's proof of any damages. The supposed flaw "resulted in [supposed] findings that . . . no damages had been properly shown," and "the deficiencies in that study undermine Vernon's whole case."[53] The district court was not "required to allow Vernon to go to the jury with its erroneous approach or give it another opportunity to refine a study that, according to Vernon, could not be refined. We think not."[54]

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[52]*FERC Transmission Task Force Report* (1989).

[53]*City of Vernon* 955 F.2d at 1371, App. at 19. The court erroneously discovered another "flaw" in the damage study because the study did not disaggregate damages attributable to § 1 and § 2 violations. Vernon was not required to disaggregate because the anticompetitive acts charged under § 1 are also violations of § 2 when a monopolist is acting alone. *Lorain Journal Co., supra*, 342 U.S. at 153-54; *Standard Oil of N.J., supra*, 221 U.S. at 61.

[54]*City of Vernon*, 955 F.2d at 1372, App. at 21.

The district court made no such findings with respect to Vernon's Section 2 claims, and summary judgment was not granted on that ground. The district court admitted the damage study over Edison's objections and granted summary judgment on the sole ground that Edison's claimed business justification was a complete defense.[55] Vernon could have readily "refined" the study in the district court if it had occasion to do so, but it had no such occasion. After the district court overruled Edison's objections and admitted the study on the Section 2 claims, Vernon had no reason to "revise" it. If the decision is not overturned, Vernon is foreclosed from ever trying its Section 2 damage case despite its *prima facie* proof of liability and its lack of any opportunity to overcome the Ninth Circuit's objections to the damage study.

Contrary to the opinion below, pro rata access is a method of measuring a shared resource in the electric utility industry accepted by regulatory agencies in issuing orders (affirmed by this Court) requiring such sharing, and "relative size share" is accepted by Edison itself as a proper pro rata measure of access.[56]

In *Terminal R.R.*, this Court compelled the owners of railroad bridges essential to competition in the relevant market to share those facilities with rival railroads on terms analogous to those hypothesized in Vernon's damage study. The Court ordered the owners to share the bridges "upon such just and reasonable terms and regulations as will, in respect of use, character and cost of service, place every such company upon as nearly an equal plane

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[55]Edison did not cross appeal claiming error in the admission of the study; nevertheless, the Court of Appeals permitted Edison to attack the study as if the study had been excluded.

[56]*E.g., Gainsville Utilities Dep't. v. Florida Power Corp.*, 402 U.S. 515 (1971) (affirming agency's interconnection order requiring pro rata reserve sharing); *Alabama Power Co. v. Nuclear Regulatory Comm'n*, 692 F.2d 1362, 1366 n. 2 (11th Cir. 1982), *aff'g* 13 N.R.C. 1027 (1981), *cert. denied*, 464 U.S. 816 (1983). Edison, Pacific Gas & Electric Co. and San Diego Gas & Electric Co. use the relative size share formulation to provide each other access to the Pacific Intertie. CR 179; ER 270-72.

as may be with respect to expenses and charges as that occupied by the proprietary companies." 224 U.S. at 411.

No authority supports the lower court's conclusion that pro rata sharing of an essential facility can be held unreasonable as a matter of law. To the contrary, other circuits have held that the reasonableness of the amount and terms of access are questions of fact for the jury.[57]

CONCLUSION

The decision below is a "frontal assault on the basic policy of the Sherman Act" in direct conflict with the decisions of this Court and of other circuits. If not overturned, the decision can seriously cripple competition in the electric utility industry which improves efficiency and results in lower prices for electricity for all consumers. Accordingly, petitioner requests the Court to grant certiorari to review the decision of the Ninth Circuit.

Dated: July 20, 1992.

Respectfully submitted,

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[57] *E.g., Delaware & Hudson R.R. Co., supra*, 902 F.2d at 179-80; *MCI Communications Corp., supra*, 708 F.2d at 1131-53.

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No. 92-.....

Supreme Court, U.S.
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In the Supreme Court

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United States

OCTOBER TERM 1992

CITY OF VERNON,
Petitioner,
VS.
SOUTHERN CALIFORNIA EDISON COMPANY,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX

No. 90-56281

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF VERNON,
Plaintiff-Appellant,

v.

SOUTHERN CALIFORNIA EDISON COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding

Argued and Submitted
October 11, 1991 — Pasadena, California

Filed February 7, 1992

Before: Mary M. Schroeder, Edward Leavy and
Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Fernandez D.C. No. CV-83-8137-MRP

OPINION

SUMMARY

Antitrust

Affirming in part, reversing in part and remanding a district court grant of summary judgment, the court of appeals held that a public utility did not engage in anticompetitive conduct by denying a city access to power transmission lines or engaging in a group boycott that prevented the city from obtaining bulk power from other suppliers.

Appellant City of Vernon received electric power from Southern California Edison Company and other electrical utilities over Edison's transmission lines. It was Edison's responsibility to see that Vernon received all of the power it needed. Most of Edison's

conduct with respect to Vernon was regulated by the FERC, including the wholesale rates Edison charged, the terms of integration agreements, and transmission rights on Edison's high voltage lines. Vernon brought an action against Edison alleging that Edison had engaged in anticompetitive conduct by denying Vernon access to power transmission lines, filing discriminatory rate schedules, and engaging in a group boycott that prevented Vernon from obtaining bulk power from other suppliers. Vernon sought damages and injuntive relief on each of its claims. The district court granted summary judgment for Edison, and denied reconsideration of its decision.

[1] Vernon did not appear to dispute the fact that retail customers would pay increased rates if it received the access sought. Nor did Vernon appear to dispute the fact that Edison was legitimately concerned about the retail rates in making its facilities access decisions. **[2]** Thus, the district court did not err in granting summary judgment against Vernon on its relative size share access claim. Vernon failed to show just why Edison was required to cease using its own facility so that Vernon could begin using it. This was not a case where Edison simply refused to supply Vernon with its power needs. The demand that Edison turn over its facility to a city simply because the city could save money by obtaining cheaper power stands the essential facility doctrine on its head. **[3]** In addition, Vernon cited no authority in support of its theory that "reasonably" access to Edison's facilities must take the form of relative size share access.

[4] Although the integrated operations agreement was one way in which Edison could meet its obligation to provide reasonable access to its essential facilities, the district court held that to the extent that Edison had a duty to integrate Vernon's power purchases, the duty was limited by legitimate business justifications. Edison offered none. **[5]** Had that determination been made at the end of a trial, there would not be error; summary judgment was another matter entirely. **[6]** Even though Edison had a duty to integrate capacity resources on reasonable notice, there was nothing to suggest that Edison was required to do so through the special condition 12 claim. Thus, summary judgment on this claim was appropriate.

[7] The court noted that the contractual right to interrupt service did not grant Edison the freedom to act anticompetitively. [8] Nonetheless, summary judgment was appropriate on this claim. There was no evidence that transmission was interrupted at any time at the behest of any person employed by Edison other than a dispatcher, who was acting as he did for unknown reasons. There was no evidence that any person with management or supervisory authority ever told any dispatchers to interrupt or to refuse transmissions for any anticompetitive reason or that dispatchers were acting on a policy of wrongfully refusing or interrupting transmission. Summary judgment on this claim was appropriate. [9] Nor was any evidence introduced by Vernon that Edison conspired with anyone to deny access to the Pacific Intertie. Because the Sherman Act requires "concerted action" by more than one entity, the district court properly granted judgment on this claim. [10] Concerning Vernon's Edison-Nevada Power boycott claims, the court agreed that Vernon's evidence was far too weak. There was no evidence that unnamed Edison dispatchers entered into conspiracies with Nevada Power dispatchers to boycott Vernon's attempt to purchase power.

[11] The court agreed with the district court that the serious flaws in the only damage study that could be proffered to the jury placed Vernon in the position of having no proper proof of damages at all. Thus, the district court did not err when it awarded summary judgment based upon his lack of evidence. [12] However, the court reversed the denial of injunctive relief as to the integrated operations agreement and remanded to the district court for consideration of the propriety of such relief if Edison unreasonably refused access to its essential facilities.

COUNSEL

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Paul G. Bower, Gibson, Dunn & Crutcher, Los Angeles, California, for the defendant-appellee.

OPINION

FERNANDEZ, Circuit Judge:

The City of Vernon ("Vernon") brought this action against Southern California Edison Company ("Edison") and alleged that Edison had engaged in anticompetitive conduct by denying Vernon access to power transmission lines, by filing discriminatory rate schedules, and by engaging in a group boycott that prevented Vernon from obtaining bulk power from other suppliers. Vernon sought damages and injunctive relief on each of its claims. The district court granted summary judgment in favor of Edison. Vernon appeals. We affirm in part and reverse in part.

BACKGROUND

Edison is an investor-owned fully integrated public utility, which generates, transmits, and distributes electric power within its service area, an area which includes much of Central and Southern California. Vernon is located in Edison's service area, but it has its own electric distribution system, and is the sole provider of retail electric service within its own boundaries. Vernon is bounded by Edison territory and by the City of Los Angeles, which also has its own service territory operated by the Los Angeles Department of Water and Power.

Although Vernon distributes power at retail within its boundaries, it generates a very small portion of its own electricity. Thus, it obtains most of its power in bulk elsewhere and receives it over Edison's transmission lines. That wholesale power is purchased from Edison or from other electrical utilities. It is Edison's responsibility to see to it that Vernon receives all of the power that it needs. Edison also purchases power from and sells it to other utilities.

Vernon and Edison have a long history of disputes over rates, access to Edison's transmission facilities, and the integration of non-Edison power sources into Edison's operating system for the

benefit of Vernon.[1] Most of Edison's conduct with respect to Vernon is regulated by the Federal Energy Regulatory Commission (FERC), including the wholesale rates Edison charges, the terms of integration agreements, and transmission rights on Edison's high voltage lines.[2]

Vernon's denial of access claims (sometimes called foreclosure claims) are based upon Edison's refusal to provide relative size share[3] access to its transmission lines, particularly the Pacific Intertie[4] and lines from the desert Southwest. Vernon also claims entitlement to what the district court characterized as "unlimited" access to Edison's 220 kV network.[5]

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[1]Integration of non-Edison power sources requires Edison to transmit power obtained from other sources while giving credit to the wholesale customer which obtained the outside power capacity credit because Edison need not maintain as much power generation capacity if power can be imported.

[2]The FERC regulates Edison's conduct pursuant to the Federal Power Act. 16 U.S.C. § 824.

[3]"Relative size share" simply refers to Vernon's theory that if it uses, for example, 1.5% of the electricity transmitted into the Edison territory then it should receive 1.5% of the firm transmission access to the EHV (Extra High Voltage) transmission lines. While Vernon's damage study based damages on an assumption that it was entitled to relative size share access, Vernon claims that it should receive a "fair share" and Edison has failed to propose any other way of calculating Vernon's fair share.

[4]The Pacific Intertie is a group of high-power transmission lines which bring hydroelectric power to Edison's control area from the Pacific Northwest. Edison shares ownership in the Pacific Intertie with several other utilities, so that it is entitled to only a portion of the lines' total capacity. The lines consist of two 500 kV AC lines, and one 800 kV DC line.

[5]The 220 kV network is the local transmission net work through which Edison transmits energy directly to its retail and wholesale customers. Vernon's claim is that its access should be unlimited unless there is insufficient capacity to meet the total demand. In that case, Vernon contends that "the constraint on the system should be shared."

Vernon claims that Edison has refused to enter into reasonable agreements to integrate Vernon's firm purchases from other sources. These claims involve a generic Integrated Operations Agreement (IOA) and Special Condition 12 (SC-12). The IOA which Edison submitted to Vernon provided that outside power resources could be integrated into Edison's service system on such terms and at such time as Edison deemed appropriate. The FERC determined that parts of the IOA, including the absence of a reasonable notice provision, were unreasonable. *Southern Cal. Edison Co.*, 41 F.E.R.C. ¶ 61,188 at 61,493-94 (1987) and *Southern Cal. Edison Co.*, 52 F.E.R.C. ¶ 61,299 at 62,202-03 (1990), *vacated in part*, 55 F.E.R.C. ¶ 61,258 (1991). SC-12 was entered into as a partial settlement of Vernon's claims that Edison was unreasonably denying integration and access. SC-12 permits Vernon to import and obtain capacity credit for outside resources without integration pursuant to an IOA.

Vernon also asserts that Edison acted anticompetitively in interrupting or refusing transmission from Nevada Power Company (Nevada Power) to Vernon. It also claims that Edison and Nevada Power engaged in a group boycott designed to keep Vernon from purchasing power from Nevada Power. Vernon and Edison entered into a contract for interruptible transmission service under which Vernon could purchase power from outside supplier on a non-firm basis. That power would then be transmitted over Edison lines. The contract provided for interruption by Edison at any time and for any reason.

The parties brought several motions for summary judgment, including those which ultimately resulted in judgment for Edison on all claims. The district court granted summary judgment on the foreclosure claims on several grounds. As to Vernon's claim that it was entitled to relative size share access, the district court determined that Edison had established a legitimate business reason for its refusal to provide the requested access, which Vernon had failed to refute. Summary judgment on the integration claims was granted on the ground that Edison had shown a legitimate business justification for not providing for integration on eighteen months' notice. The court granted summary judgment on the SC-12 claims because Edison had no obligation to

offer SC-12 and its failure to offer it sooner was not an antitrust violation. The court granted summary judgment on the interruptible transmission service claims because Vernon had not quantified damages. The court viewed that claim as arising from a contractual dispute, and found no material issue of fact regarding whether Edison's reasons for interrupting were legitimate.

The district court also granted Edison's motion for summary judgment on its claims that Edison had discriminated against Vernon in its rates[6] and on the claim that Edison and Nevada Power engaged in a group boycott against Vernon. The court concluded that summary judgment was appropriate because Vernon had presented no evidence of damages and Vernon had failed to introduce evidence sufficient to sustain a finding of concerted action. Eventually, the court determined that judgment was appropriate on all of Vernon's claims, including a claim that Edison had conspired with others to deny access to the Pacific Intertie. Vernon asked the district court to compel Edison to bring a motion for summary judgment on the latter claim, but the district court declined to require the filing of a separate motion.

After entry of judgment, Vernon filed a timely motion for reconsideration. The district court declined to reconsider its decision.[7] Vernon filed a timely notice of appeal.

JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction under 15 U.S.C. §§15 and 26. We have jurisdiction under 28 U.S.C. § 1291.

We review a grant of summary judgment de novo. *Image Technical Serv., Inc. V. Eastman Kodak Co.*, 903 F.2d 612, 614 (9th Cir. 1990), *cert. granted,* 111 S. Ct. 2823, 115 L. Ed. 2d 994

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[6]Vernon has not appealed the district court's grant of summary judgment on its rate claim.

[7]Though Vernon appealed from the denial of its motion for reconsideration, it presented no argument on appeal that the district court abused its discretion in denying the motion. In any event, we find no abuse of discretion because Vernon should have been able to present evidence of pretext, if any, at the original summary judgment hearings.

(1991). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.*

Summary judgment is appropriate if the nonmoving party bears the ultimate burden of proof at trial as to an element essential to its case, and fails to make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986).

DISCUSSION

To establish a violation of Section 2 of the Sherman Act, 15 U.S.C. § 2(§ 2), Vernon would have to show (1) that Edison possessed monopoly power in the relevant market; (2) that it willfully acquired or maintained that power; and (3) that Vernon suffered a causal antitrust injury. *Oahu Gas Serv., Inv. v. Pacific Resources, Inc.,* 838 F.2d 360, 363 (9th Cir.), *cert. denied,* 488 U.S. 870, 109 S.Ct. 180, 102 L. Ed. 2d 149 (1988). An attempt to monopolize is also actionable under § 2. Attempted monopolization has three elements: "specific intent to monopolize, predatory or anticompetitive conduct and a dangerous probability of success." *Drinkwine v. Federated Publications, Inc.,* 780 F.2d 735, 740 (9th Cir. 1985), *cert. denied,* 475 U.S. 1087, 106 S. Ct. 1471, 89 L. Ed. 2d 727 (1986). Vernon would also be required to show causal antitrust injury in an attempted monopoly case. *California Computer Products, Inc. v. IBM Corp.,* 613 F.2d 727, 736 (9th Cir. 1979).

To establish a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (§ 1), Vernon would have to prove "three elements: (1) an agreement or conspiracy among two or more persons or distinct business entities: (2) by which the persons or entities intend to harm or restrain competition; and (3) which actually restrains competition." *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.,* 924 F.2d 1484, 1488 (9th Cir. 1991) (citation and quotations omitted).

A. *Essential Facility Claims.*

Vernon's foreclosure claims are based on its assertion that the EHV transmission lines, such as the Pacific Intertie and the Southwest lines, as well as the 220 kV grid, are essential facilities to which Edison has improperly refused Vernon access. In our opinion in the companion to this case, *City of Anaheim v. Southern California Edison Co.*, No. 90-56375, slip op. 1221 (9th Cir. 1991), filed on the same date as this opinion, we have outlined the nature of the essential facility doctrine and the elements necessary to prove liability for the refusal to allow use if an essential facility. *Id.* at slip op. 1233-36. *See also Alaska Airlines, Inc. v. United Airlines, Inc.*, No. 90-55162, slip op. 14751, 14762-68 (9th Cir. Oct. 29, 1991). Of course, that same law applies here.

However, in this case the district court assumed for purposes of the summary judgment motion "that there was competition between Edison and Vernon, that Edison had monopoly power in a properly defined market, and that Edison's transmission lines are essential facilities." Therefore, we will only determine whether given those assumptions Edison has committed an anti-trust violation by refusing to give all of the access to the facilities that Vernon desires.[8]

1. *Relative Size Share Access.*

The district court determined that there were no genuine issues of material fact with respect to Edison's claim that it had a legitimate business justification for refusing relative size share access. Vernon asserted that Edison's business justification was insufficient as a matter of law, but also asserted that the alleged justification was untrue. However, as noted by the district court, Vernon did not point to any facts in opposition to Edison's motion for summary judgment which would create a material issue of

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[8]We note that the district court granted summary judgment on at least some of the claims because Vernon failed to offer sufficient proof of damages from alleged misconduct. We will address the damages issue in Part C of this opinion.

fact. Instead, Vernon argued that if the asserted justification was not insufficient as a matter of law, a jury should be permitted to decide whether a slight increase in retail prices to Edison's customers was a legitimate business reason for Edison's refusal to grant relative size share transmission access.

[1] At the time of the summary judgment motion, Vernon did not appear to dispute the fact that retail customers would pay increased rates if it received the access sought — indeed, Vernon's damage study reflected that fact. Nor did Vernon appear to dispute the fact that Edison was legitimately concerned about the retail rates in making its facilities access decisions.[9]

[2] The district court did not err in granting summary judgment against Vernon on the relative size share access claim. Although the defendant generally has the burden of coming forward with a legitimate business justification after the plaintiff has shown evidence of monopolistic intent, the plaintiff, in this case Vernon, ultimately has the burden of proving that the defendant acted without a legitimate business justification. *Image Technical*, 903 F.2d at 620 n.9; *Calculators Hawaii, Inc. v. Brandt, Inc.*, 724 F.2d 1332, 1339 (9th Cir. 1983). *Cf. Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608-611, 105 S. Ct. 2847, 2860-61, 86 L. Ed. 2d 467 (1985) (implying that defendant has burden of production and proof). In order to survive summary judgment, Vernon had to point to evidence demonstrating that there was a genuine issue of material fact as to whether Edison in fact acted on the asserted grounds. Having failed to do so, summary judgment was appropriate. Furthermore, Vernon fails to demonstrate just why Edison is required to cease using its own facility so that Vernon can begin using it. This is not a situation where Edison had no use for the facility and arbitrarily denied someone else its use. *See MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1133 (7th Cir.) (AT&T was not asked to abandon its facilities; no business reason shown for refusal), *cert. denied*, 464

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[9]It is legitimate for Edison to refuse access that will affect its rates to the detriment of its customers. *See City of Anaheim*, slip op. 1237.

U.S. 891, 104 S. Ct. 234, 78 L. Ed. 2d 226 (1983). Nor is it a case where Edison simply refused to supply Vernon with its power needs. *See Otter Trail Power Co. v. United States*, 410 U.S. 366, 378, 93 S. Ct. 1022, 1030, 35 L. Ed. 2d 359 (1973). In fine, Edison clearly had a use for its lines. As we pointed out in *City of Anaheim*, slip op. 1236, the demand that Edison turn over its facility to a city simply because the city could save money by obtaining cheaper power stands the essential facility doctrine on its head.

[3] But, even had Vernon offered some evidence which raised a material issue of fact with respect to Edison's reasons for refusing relative size share access, we can find no authority — and Vernon has pointed to none — which supports Vernon's theory that "reasonable" access to Edison's facilities must take the form of relative size share access. Even more to the point, Vernon admits that it never requested relative size share access to Edison's transmission facilities. The district court properly granted summary judgment.

2. *Integrated Operations Agreement.*

[4] The IOA was one way in which Edison could meet its obligation to provide reasonable access to its essential facilities. The district court held that to the extent that Edison had a duty to integrate Vernon's power purchases, the duty was limited by legitimate business justifications. The court found no triable issue of fact on this claim and determined that summary judgment was appropriate because Edison had a legitimate business justification for not providing for an eighteen month notice period[10] when the FERC had determined that a three year period was reasonable.

Assuming, as the district court did, that Edison is a monopolist in control of an essential facility, it must not unreasonably deny access to the facility to its competitors. *MCI*, 708 F.2d at 1132. Given that predicate, we conclude that Edison had a duty to

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[10]The 18 month period versus three year period engendered confusion because Vernon's damage study was based on the 18 month notice period provided in Special Condition 12.

integrate purchases of outside resources upon reasonable notice. Despite the assumptions made in Vernon's damage study, Vernon's complaint is not that Edison refused to allow integration on 18 months' notice, but that Edison refused to allow integration until it felt like it. The IOA proposed by Edison did not contain a particular notice period — integration occurred at Edison's discretion.[11] The FERC determined that Edison's discretionary standard was unreasonable, and that a three year period was reasonable notice. *Southern Cal. Edison Co.*, 41 F.E.R.C. at 61,493-94; *Southern Cal. Edison Co.*, 52 F.E.R.C. at 62,202-03.[12]

Edison offered no legitimate business reason for its refusal to provide a reasonable notice period. Rather, in support of its motion for summary judgment, it simply asserted that it had no duty under the antitrust laws to provide integration on reasonable notice. We find little merit in that contention. In any event, it seems unlikely that Edison could have prevailed on a claim that it had a legitimate business reason for refusing to establish a reasonable notice period. The integration agreement provided benefits not only to the municipal utility, but to Edison as well. Edison would be able to avoid adding additional generating capacity and it also received a portion of the integrated electricity as reserves. The municipality would be able to lower its costs. Thus, in refusing to provide for a reasonable notice period, Edison was foregoing a benefit to itself and its ratepayers. *Cf. Aspen Skiing*, 472 U.S. at 608, 105 S.Ct. at 2860. A trier of fact might well conclude that Edison had no legitimate business reason for refusing to enter into a reasonable IOA.

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[11]As characterized by the FERC, the IOA would have permitted Edison to "subordinate a completed city project [desired to be integrated] to an Edison project that may still be in the early stages of development or which may be deferred or never completed." *Southern Cal. Edison Co.*, 41 F.E.R.C. at 61,494.

[12]The district court did not determine what notice requirement would be reasonable, but concluded that no liability could be imposed for refusal to adopt a notice period of less than three years. Vernon asserted before the FERC that a three year period was reasonable and the FERC agreed.

[5] In other words, based upon all of the assumptions that the district court made for summary judgment purposes, it is possible that a trier of fact would find that Edison's IOA position could have been an attempt to use monopoly power to eleminate competition. Had the determination of the district court been made at the end of a trial, there would not be error; summary judgment is another matter entirely.[13]

3. *Special Condition 12 Claim.*

[6] The district court found that Edison had no obligation under the antitrust laws to offer SC-12 to Vernon, particularly where Edison could reasonably require three years notice for integration of capacity resources. Even though Edison had a duty to integrate capacity resources on reasonable notice, there is nothing to suggest that Edison was required to do so through SC-12. In addition, it appears that there are no damages attributable to Edison's failure to implement SC-12 sooner which are separable from Edison's failure to provide for integration on reasonable terms. As Vernon contends that SC-12 was only a partial correction of the defects in the IOA, there would appear to be no additional losses from any delay or limitation in SC-12 over and above the losses allegedly caused by the improper IOA. Summary judgment on this claim was appropriate.

4. *Interruptible Transmission Service.*

The district court concluded that three grounds supported summary judgment on Vernon's claims that Edison improperly denied, interrupted or curtailed Interruptible Transmission Service (ITS) from Nevada Power to Vernon. First, the court concluded that Vernon had failed to quantify any damages from the interruptions.[14] Second, the court concluded that an antitrust claim could not be based on a contractual dispute as to the reasonableness of conduct." Finally, the court concluded that

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[13]However, see the damage discussion in Part C of this opinion.

[14]See our discussion of damages in Part C of this opinion.

Vernon had failed to demonstrate that Edison's reasons for interrupting transmission were not legitimate.

[7] We are not convinced that antitrust liability may not be predicated on conduct which also happens to create a contract dispute. It is certainly true that a claimed breach of contract by unreasonable conduct, standing alone, should not give rise to antitrust liability. But in this case, Vernon is not simply claiming that Edison breached its contract. Instead, Vernon is claiming that by preventing the purchase of electricity from Nevada Power, Edison acted anticompetitively and without a legitimate business reason. The fact that Vernon and Edison have a contract allowing Edison to interrupt transmission "for any reason" is beside the point. The contractual right to interrupt service does not grant Edison the freedom to act anticompetitively. *See California v. Chevron Corp.*, 872 F.2d 1410, 1414 (9th Cir. 1989) discussing pendent state law claims to antitrust case), *cert. denied*, 493 U.S. 1076, 110 S. Ct. 1126, 107 L. Ed. 2d 1032 (1990). *See also City of Long Beach v. Standard Oil*, 872 F.2d 1401 (9th Cir. 1989) (discussing antitrust claims in action related to *California v. Chevron*), *amended*, 886 F.2d 246, *cert. denied*, 493 U.S. 1076, 110 S. Ct. 1126, 107 L. Ed. 2d 1032 (1990). In short, Edison might avoid contractual liability through the interruption provision, although even that is questionable, *California v. Chevron Corp.*, 872 F.2d at 1414, but the contractual limitation does not speak to antitrust concerns.

That, however, does not itself demonstrate that summary judgment was inappropriate. At first blush, Vernon's evidence seems to raise an issue of fact as to whether Edison's asserted business justifications for interrupting transmission were legitimate. There was some evidence from which a trier of fact could conclude that Vernon encountered refusals to provide transmission even when Edison had capacity available.

Nonetheless, summary judgment was appropriate on this claim. It is not enough for a party to content itself once it has produced a mere scintilla of evidence to support its case. Rather, as the Supreme Court held in *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986), the record must be sufficient to "lead a

rational trier of fact to find for the non-moving part . . ." That requirement was underscored in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986) where the Court held that the evidence must have sufficient strength to allow a reasonable jury to "return a verdict for the nonmoving party." Here the evidence does not reach that level.

Vernon's evidence consists of an entry in a Nevada Power log that indicates that on one occasion there was a refusal to allow transmission if Nevada Power was "purchasing [power] from the east," and a sworn statement and a deposition from a single former Nevada Power dispatcher, Richard Greenwalt.

[8] Greenwalt's testimony was to the effect that there was on occasion a refusal to allow transmission which prevented Nevada Power from making a sale to Vernon. He indicated that some possibly improper statements were made to him "reasonably often" or were "very common." His exact meaning is not clear. More than that, he gave absolutely no specifics as to person or as to time. Detail of a kind that would allow evaluation of the accuracy of his recall or of the consistency and extent of the acts is missing. Certainly, there was no evidence that transmission was interrupted at any time at the behest of any person employed by Edison other than a dispatcher, who was acting as he did for unknown reasons. There was no evidence that any person with management or supervisory authority ever told any dispatchers to interrupt or to refuse transmissions for any anticompetitive reason or that dispatchers were acting on a policy of wrongfully refusing or interrupting transmission. There was no evidence produced to show that any management level personnel ever approved or ratified wrongful transmission interruptions or refusals.

It is important to remember that this is not a simple tort case where a single incident is enough to support liability. The claim in this case is that there was relatively long-term activity aimed at crushing a competitor. If proved, antitrust liability and treble damages would be imposed upon Edison. Yet, Vernon proposed to proceed with this complex antitrust case based upon evidence which almost entirely consisted of statement from a former Nevada Power employee operating at a fairly low level. As

already mentioned, his statements were that unknown employees of Edison, operating at a similarly low level, interrupted transmission from time to time improperly. Who did it remains unknown. When they did it remains equally unknown. There is an almost total absence of detail. Against that Edison did all one could do: it submitted numerous affidavits from Nevada Power and Edison employees who stated that they never did those things or even heard of them. Their testimony, which was uncontested and unchallenged, indicates that if the threats did occur they were neither frequent no uniformly issued.

We agree with the district court that antitrust liability must be composed of stronger stuff. In so doing we do not mean to suggest that lower level employees cannot involve a corporation in antitrust liability. Nor do we suggest that credibility determinations should be made at the time of summary judgment.

As to the former, we recognize that even if an employee is violating express corporate policy, the corporation might still be held responsible. As long as the employee is acting within the scope of his employment, imposition of liability upon the corporation is appropriate. *See United States v. Portac, Inc.*, 869 F.2d 1288, 1293 (9th Cir. 1989), *cert denied*, ____ U.S. ____, 111 S. Ct. 129, 112 L. Ed. 2d 97 (1990); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004-07 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125, 93 S. Ct. 938, 35 L. Ed. 2d 256 (1973). *See also American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 102 S. Ct. 1935, 72 L. Ed. 2d 330 (1982). Nevertheless, we do not believe that the employee's position within the organization can be entirely ignored when we are attempting to determine whether antitrust activity was afoot at all. For example, in each of the cases just cited a conspiracy to act for anticompetitive reasons was clearly present and the employee involved wielded a good deal of authority. In *Hilton Hotels* there was a full blown conspiracy and the employee in question was *the* purchasing agent for the hotel in question. 467 F.2d at 1004. In *Portac*, also, there clearly was a conspiracy and, again, the employee involved was the sole purchasing agent for the defendant. 869 F.2d at 1293. Finally, in *American Society of Mechanical Engineers* there was a clear conspiracy to violate the antitrust

laws. One of the participants was the chairman of the subcommittee that issued a letter designed to carry out the anticompetitive intentions. 456 U.S. at 560-62, 102 S. Ct. at 1939-40. The letter was then signed by the secretary of the committee itself, and carried great weight in the engineering industry. *Id.* at 561-64, 102 S. Ct. at 1940-41. In the case at hand, however, the most Vernon has shown is that one or more unidentified members of an amorphous group of Edison dispatchers occasionally unnecessarily interrupted power transmissions for largely unexplained reasons, some of which may have been improper. They did so while pursuing a myriad of transactions conducted over a long period.

Nor need we or should we evaluate credibility at summary judgment. *See McLaughlin v. Liu,* 849 F.2d 1205, 1207 (9th Cir. 1988). Nevertheless, the testimony of Mr. Greenwalt, even if accepted, would not be sufficient to allow a rational trier of fact to impose antitrust liability on Edison. The question here is not simply whether Edison can be held liable for the proven antitrust violations of employees acting with apparent authority, *see Hilton Hotels,* 467 F.2d at 1004 and *Portac,* 869 F.2d at 1293, but whether a rational jury could conclude that there were antitrust violations in the first place. In evaluating that question, the fact that Mr. Greenwalt could not recall any names, dates or times further indicates that Vernon has not raised a factual dispute sufficient to survive summary judgment.

In sum, more evidence that that produced by Vernon would be needed to impose liability upon Edison on this claim. The district court did not err when it granted summary judgment.

5. *The Pacific Intertie.*

[9] Vernon asserted that Edison violated § 1 by conspiring with others to prevent Vernon from obtaining access to the Pacific Intertie.[15] We recognize that in Vernon's § 1 claim with respect to the Pacific Intertie, Edison, no Vernon, would have the burden of

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[15]While Edison contends that Vernon abandoned its Pacific Intertie claims, it is clear from the record that Vernon did not do so. We find no error in the district court's entry of judgment on this claim without a

proving that it had a legitimate business purpose for foreclosing access. *Image Technical*, 903 F.2d at 618 n.5. However, a review of the record does not reveal *any* evidence adduced by Vernon that Edison conspired with anyone to deny access to the Pacific Intertie. A § 1 violation requires "concerted action" by more than one entity. *The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1152 (9th Cir. 1988).[16] The district court properly granted judgment on this claim.

B. *Edison-Nevada Power Boycott Claims.*

To prevail on a claim under § 1, Vernon would have been required to show concerted action on the part of Edison and Nevada Power. *The Jeaney*, 849 F.2d at 1152. The district court granted summary judgment on the horizontal boycott claims on the grounds that Vernon had failed to show evidence of damages from the alleged boycott and because Vernon had failed to offer evidence of concerted action.

We agree with Vernon that a conspiracy to monopolize may exist even where one of the conspirators participates involuntarily or under coercion. *Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674, 682 (9th Cir.), *cert. denied*, 429 U.S. 940, 97 S. Ct. 355, 50 L. Ed. 2d 309 (1976). To survive summary judgment, a plaintiff must point to evidence " 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986) (citation omitted); *Morgan, Strand*, 924 F.2d at 1488. Edison makes much of this language and suggests that Vernon's evidence does not exclude the possibility of independent action. But *Matsushita* does not extend quite as far as Edison suggests. Following its "exclude the possibility" language, the Court stated that the

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formal motion for summary judgment, since Vernon acceded to the entry of judgment on this claim.

[16]Vernon also conceded that it had not segregated damages on the Pacific Intertie claims. See our discussion of damages in Part C of this opinion.

nonmoving party, "in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed" it. *Id.*, 475 U.S. at 588, 106 S. Ct. at 1356-57. Nevertheless, Vernon did not even meet this somewhat lesser standard.

[10] Here, too, Vernon's evidence was far too weak. First, there is no evidence that the alleged acts by the unnamed Edison dispatchers were more than random, unauthorized acts by employees. There was no showing, in other words, that these Edison dispatchers entered into conspiracies with Nevada Power dispatchers to boycott Vernon's attempt to purchase power. Second, if Edison refused to transmit Nevada Power's electricity over Edison lines, Nevada Power had no choice but to acquiesce. That does not make it a conspirator. Third, as the district court noted, it would be most difficult to draw a reasonable inference of conspiracy where there was no meeting of the minds. Instead, according to Vernon's evidence, Edison had to continually threaten Nevada Power dispatchers and they did not necessarily accede to those threats. The district court did not err.

C. *Damages.*

Vernon presented the court with a damage study which was, at best, seriously flawed. That resulted in findings that because no damages had been properly shown, there was an independent reason to grant summary judgment on various claims against Edison. Vernon asserts that the district court erred. We do not agree. Indeed, the deficiencies in that study undermine Vernon's whole case.

The principles which the courts follow in deciding this issue are well described in *MCI*. There the court reviewed a damage verdict and in so doing made the following observations:

> Once *causation* of damages has been established, the *amount* of damages may be determined by a just and reasonable estimate as long at the jury verdict is not the product of speculation or guess work. Since the Supreme Court has been willing to accept a degree of uncertainty in the calculation of damages, strict proof of what damages

> have been caused by which acts has not been required. Not requiring strict disaggregation of damages among the various unlawful acts of the defendant serves to prevent a defendant from profiting from his own wrongdoing and makes sense when damages arise from a series of unalwful acts interwined with one another.
>
> . . . .
>
> The courts have always distinguished between proof of *causation* of damages and proof of the *amount* of damages. Thus, the courts have been consistent in requiring plaintiffs to prove in a reasonable manner the link between the injury suffered and the *illegal* practices of the defendant.

708 F.2d at 1161 (citations omitted).

The court continued as follows at page 1163:

> There is nothing inconsistent between requiring *proof that damages were caused by illegal acts* and the rule that a plaintiff need not disaggregate damages among those acts found to be unlawful. In this case, the trial court granted summary judgment for AT & T on seven of the twenty-two counts in the complaint. In addition, the jury found for AT & T on five of the fifteen counts it considered. The jury found for MCI on two counts relating to Hi-Lo tariffs, two counts relating to the tariffs filed with state agencies, and six counts relating to interconnection. In addition, this court has now determined that the jury's findings for MCI on the pricing and pre-announcement of Hi-Lo as well as the finding relating to denial of multipoint interconnections must be set aside.
>
> MCI assumed in the preparation of its damage study that all twenty-two of AT & T's acts charged were illegal. In fact, liability has now been established with respect to only seven of the twenty-two counts of alleged monopolization. MCI's lost profits study does not establish any variation in the outcome depending on which acts of AT & T were held to be legal and which illegal.

The result was a remand for a new trial on the damage issue. We accepted that view in *Farley Transp. Co., Inc. v. Santa Fe Trail Transp. Co.*, 786 F.2d 1342, 1352 (9th Cir. 1985) (footnote omitted), where we, too, declared that the plaintiff's "utter failure to make any segregation between damages attributable to lawful competition and that attributable to the unlawful scheme to deviate from the tariff rate requires reversal of the verdict and remand for a new trial on the amount of damages." *Cf. William Inglis & Sons Baking Co. v. Continental Baking Co., Inc.*, 942 F.2d 1332, 1341 (9th Cir. 1991) (where lost profits calculation was wholly speculative, the district court should have granted judgment notwithstanding the verdict).

Here, of course, the matter came up before trial commenced and at a time when the only possibly admissible damage study was before the court. That study failed to segregate the losses, if any, caused by acts which were not antitrust violations from those that were. Nor did Vernon attempt or offer to make corrections. Rather, according to its own expert Stephen Flanagan, speaking in the context of the group boycott claim, Vernon would not or could not do so. That might well have been because Vernon's deeply flawed study is the handmaiden of its equally flawed theory that it should have proportionate firm access to Edison's whole system at all times.

The question remaining is whether the district court was nevertheless required to allow Vernon to go to the jury with its erroneous approach or to give it still another opportunity to refine a study that, according to Vernon, could not be refined. We think not.

We dealt with a similar situation in *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802 (9th Cir. 1988). There the damage studies of the plaintiffs were plainly insufficient, so the district court excluded them. We held that the absence of a proper study meant that the plaintiffs "could make no showing about the amount of damages." *Id.* at 808. As a result, there was no "competent evidence from which a jury could fairly estimate damages," *id.* at 808, and summary judgment was proper. *See also ILC Peripherals Leasing Corp. v. International Business Mach. Corp.*, 458 F. Supp. 423, 434 (N.D. Cal. 1978) (summary judgment granted

where the damage study did not separate effects of various acts so that "there was no basis in the record for the jury to determine what the effect on damages would be if it found one or more of the challenged acts lawful.")

In *McGlinchy*, we cited our earlier case of *Dolphin Tours Inc. v. Pacifico Creative Serv., Inc.*, 773 F.2d 1506 (9th Cir. 1985), a case in which the damage study presented at the time of summary judgment was also flawed. There, however, the flaws did not appear to be insurmountable and we opined that "Dolphin has presented evidence from which a jury could reasonably estimate the amount of Dolphin's injury without speculation if Dolphin's damage evidence were filled in by testimony at trial." *Id.* at 1513. We had confidence in that possibility because it appeared that the date already existed even though it had not yet been placed in the proposed damage report. Moreover, we said, if the repair was not made the district court could grant a directed verdict or a judgment notwithstanding the verdict.

Here we have no such confidence. Vernon insists that all of Edison's acts contributed to the damage figure, but the district court and we have already found that many of those acts were proper. It might be argued that since Vernon had a contract with Nevada Power which was to save Vernon $80,000 per month and did not, there was at least a loss of that amount, damage studies notwithstanding. However, that argument would suffer from the same flaw because there is no indication of what part of that $80,000 loss of savings was due to proper interruptions of service and what part to improper ones, or for that matter, due to other factors entirely.

[11] In short, we agree with the district court that the serious flaws in the only damage study which could be profferred to the jury placed Vernon in the position of having no proper proof of damages at all. Thus, the district court did not err when it awarded summary judgment based upon this lack of evidence.

D. *Injunctive Relief.*

[12] Injunctive relief might be appropriate if Edison has unreasonably refused access to its essential facilities. *Otter Tail*

Power Co., 410 U.S. at 381-82, 93 S. Ct. at 1031-32. The court did not grant any injunctive relief because it concluded that Edison had not violated the antitrust laws. However, summary judgment on Vernon's claim that Edison's refusal to provide for a reasonable notice term in the IOA was proper only because Vernon failed to quantify damages which resulted from that conduct. Thus, it is possible that Vernon will be entitled to injunctive relief if it can prove an antitrust violation. We therefore must reverse the denial of injunctive relief as to the IOA claim only and remand the case to the district court to determine the propriety of injunctive relief.

CONCLUSION

Here, as in *City of Anaheim*, slip op. 1221, we need only decide whether the actions of Edison violated the antitrust laws. The district judge held that Edison did not violate those laws, and, even if it did, Vernon did not properly delineate damages. For the most part we agree.

Therefore, we affirm the district court in every respect save one. That one is: the district court erred in granting summary judgment on Vernon's claim for injunctive relief arising out of Edison's refusal to develop reasonable terms for integrated operations agreements.[17]

AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS. The parties shall bear their own costs on appeal.

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[17]We deny Edison's motion ot strike portions of Vernon's brief and excerpts.

Filed April 21, 1992
Cathy Caterson, Clerk, U.S. Court of Appeals

No. 90-56281

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF VERNON,
Plaintiff-Appellant,
v.
SO. CALIFORNIA EDISON COMPANY
Defendant-Appellant,

ORDER

Before: SCHROEDER, LEAVY, and FERNANDEZ, Circuit Judges.

The panel has unanimously voted to deny the appellant's petition for rehearing. The suggestion for rehearing en banc was circulated to the active judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing and the suggestion for rehearing en banc are accordingly DENIED.

CASE NO. CV 83-8137 MRP

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CITY OF VERNON, CALIFORNIA
Plaintiff,
v.
SOUTHERN CALIFORNIA EDISON COMPANY,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF ORDER GRANTING EDISON'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S FORECLOSURE CLAIMS

Having read and considered the papers and evidence submitted in connection with defendant Southern California Edison Company's ("Edison's") Motion for Summary Judgment on plaintiff's foreclosure damage claims, associated motions of defendant Edison and plaintiff the City of Vernon ("Vernon") and the pleadings filed herein, and having heard oral argument with respect to the proposed findings and conclusions and objections thereto, the Court finds and concludes as follows:

A.

FINDINGS OF FACT

1. INTRODUCTION

1.1 Plaintiff Vernon's First Amended and Supplemental Complaint in this action alleged, *inter alia*, that Edison violated §§ 1 and 2 of the Sherman Act through a pattern of conduct commencing in 1961 and continuing into the present. Vernon's contentions fall into three basic categories: (1) those relating to the terms and conditions of Vernon's access to Edison's transmission lines and access to non-Edison sources of power (the "foreclosure" claims); (2) those concerning Edison's rates; and (3) those asserting a conspiracy between Edison and the Nevada Power Company to boycott Vernon.

1.2 Edison has filed motions for partial summary judgment on Vernon's § 2 rate and § 1 group boycott claims, and for summary judgment on Vernon's foreclosure claims.

1.3 By its Order dated March 1, 1990 and "Memorandum of Decision Granting Motions for Summary Judgment with Respect to Rate Claims and Group Boycott Claims" filed March 7, 1990 (the "Memorandum of Decision"), the Court granted Edison's motions for partial summary judgment on the plaintiff's rate and boycott claims.

1.4 These Findings of Fact and Conclusions of Law are made in connection with the Court's Order dated March 1, 1990 granting Edison's Motion for Summary Judgment on Plaintiff's Foreclosure Damage Claims.

2. FACTUAL BACKGROUND

(a) *Southern California Edison Company*

2.1 Defendant Edison is an investor-owned utility that provides electric service in central and southern California, within a service territory established by the California Public Utilities Commission ("CPUC").

2.2 Edison, as a fully integrated electric utility, generates, transmits, and distributes electricity.

2.3 Edison provides electric service to residential, commercial, and industrial customers located throughout its service territory.

2.4 Edison also purchases electricity from and sells electricity to other utilities located outside its service territory.

2.5 Edison operates its own electric "control area." A "control area" can be viewed as an area or system within which the operation of all generation, transmission and distribution facilities must be coordinated so that the system is operated as a synchronized integrated whole, at the same frequency, and in a reliable fashion. Typically every major utility operates a control area.

(b) *Vernon and the Other Resale Cities*

2.6 Plaintiff is a California municipality that owns its own distribution system and provides electric service at retail within its boundaries. While Vernon has some generating capacity, most of the power it sells is acquired through wholesale purchases from Edison or other bulk power suppliers.

2.7 Vernon occupies an area of approximately 5.06 square miles and is located within Edison's service territory. Vernon has common boundaries with the City of Los Angeles, the service territory of the Los Angeles Department of Water and Power ("LADWP") and other cities in Los Angeles County that are also within Edison's service territory. Vernon is primarily an industrial city.

2.8 In addition to Vernon, Edison's "wholesale" or "resale" customers include the cities of Anaheim, Azusa, Banning, Colton, and Riverside (the "Cities"). Because they purchase from Edison wholesale electricity that they resell to their retail customers, Vernon and the Cities are sometimes referred to as "Resale Cities." Like Vernon, the Cities are located within Edison's service territory and each own their own distribution systems and provide electric service at retail within their boundaries. Because Vernon and the Cities do not operate their own control areas and are within Edison's control area, Edison has the ultimate responsibility for meeting their system load requirements.

2.9 From 1962 to 1977, Vernon purchased all of its electricity that it resold to its resale customers from Edison pursuant to an operating agreement entered into by the parties. Since 1977, Vernon has been a partial requirements customer of Edison.

2.10 Vernon and Edison entered into a limited Integrated Operations Agreement ("IOA") restricted to Vernon's participation in the Palo Verde Nuclear Generating Station located in Arizona. Vernon has an ownership interest in this generation facility and has participated through the Southern California Public Power Authority, in which it is a member. The Edison-Vernon Palo Verde IOA is Exhibit P to the O'Malley Opposition Declaration.

(c) *Edison's Transmission Network*

2.11 Edison's transmission lines are a part of an interconnected series of transmission lines connecting Edison with other utilities located throughout the western United States. Edison's Extra High Voltage ("EHV") transmission lines (generally operated at 500 kV or above) are used for the transmission of large blocks of power from remote generation resources, including those of other utilities, to the main grid of Edison's transmission system which is operated at 220 or 230 kilovolts or "kV" (the "220 kV network").

2.12 One group of EHV transmission lines in which Edison has rights is the Pacific Intertie. The Pacific Intertie consists of two 500 kV alternating current ("AC") lines running from Oregon through California (the "AC lines") and one 800 kV direct current ("DC") line running from Oregon through Nevada into Southern California (the "DC line").

2.13 Edison's EHV transmission lines to the Southwest consist principally of 500 kV AC lines from the Los Angeles basin to Nevada, Palo Verde (in Arizona) and the Four Corners area (in New Mexico). Other EHV transmission lines to the Southwest are owned by LADWP, San Diego Gas & Electric Company and the Southern California Public Power Authority.

2.14 Edison's 220-kV network, which consists of a grid or network of 220 or 230 kV transmission lines, is situated in the greater Los Angeles metropolitan area. Edison's 220 kV network connects with a number of major utilities, including LADWP and the California Department of Water Resources ("CDWR").

(d) *Regulation*

2.15 The terms and conditions of Edison's rates and service to its retail customers are regulated by the CPUC. The CPUC also has jurisdiction over Edison in that Edison cannot dispose of its assets or rights which are used or useful for service to retail customers without CPUC approval.

2.16 Edison's rates and terms of service to its resale customers are regulated by the FERC. Any agreements between Edison

and its Resale Cities, including Vernon, regarding resale service or transmission must be filed with the FERC. Edison cannot legally charge a rate or provide a service to a Resale City without an appropriate FERC rate schedule for that rate or service being in effect.

2.17 In 1972, in part as a result of certain antitrust claims brought by the Cities, Edison and each of the Resale Cities entered into settlement agreements. Those agreements, in addition to releasing Edison from antitrust liability for conduct prior to that time, contemplated a framework within which the Resale Cities could begin to acquire energy from other sources and integrate it into the Edison system.

2.18 Integration is a contractual concept under which resources and loads of independent parties are planned and operated as if they were a single system.

2.19 The integration of resources into Edison's system, as opposed to the mere transmission of such energy by Edison is important because of Edison's rate structure. If Edison integrates a proposed resource, Edison gives the customer credit not only for the energy brought into the system, but also a "capacity credit" for the reduction in generating capacity Edison must maintain.

2.20 Anaheim and Riverside, after five years of negotiations, entered into IOAs with Edison to establish standards for the integration and transmission of resources. These IOAs became part of Edison's rate schedules in 1979.

2.21 Vernon did not seek to participate in the negotiations for IOAs that took place in the 1970s.

2.22 Azusa, Banning and Colton entered into IOAs similar to those entered into by Anaheim and Riverside. These IOAs became part of Edison's rate schedules in 1981.

2.23 Since 1981, Edison has offered to enter into an IOA with Vernon similar to the IOAs with the five Cities. Vernon, however, has refused to enter into such a "generic" IOA.

2.24 Under the 1972 Settlement Agreements, and the Cities' generic IOAs, Edison must provide the Resale Cities with all of

their requirements for electricity to the extent the Resale Cities are unable to obtain power from others or from their own facilities. The IOAs have allowed the Resale Cities to build their own generation projects, to participate in joint projects with others, and to purchase capacity from others.

2.25 Edison's standard for the timing of capacity credit in the generic IOAs, § 8.1.2.3 of the IOAs, past applications of that standard, as well as other terms of the IOAs were challenged in FERC Docket No. ER81-177. Although the decision in that Docket is still subject to rehearing, the FERC concluded that the standard set forth in § 8.1.2.3 of the generic IOAs was not just and reasonable because it allowed Edison to discriminate unduly in determining when a wholesale customer should begin receiving capacity credits for a noticed resource. The FERC concluded that a three-year notice requirement for partial requirements customers who intend to acquire and integrate a capacity resource was reasonable. In that FERC Docket, Vernon proposed and supported the position that a three-year notice requirement should be adopted for the integration of a capacity resource. Docket No. ER 81-177, 27 FERC ¶ 63.053 at 65,205, incorporated by the FERC in its decision (41 FERC ¶ 61,188 at 61,496). In addition, the FERC found other terms in the generic IOA to be unreasonable.

2.26 In this action, Vernon does not contend that a three-year notice requirement for the integration of capacity is unreasonable.

(e) *Special Condition 12*

2.27 In addition to the IOAs, Special Condition 12 allows the Resale Cities, in certain circumstances, to import and receive credit for capacity obtained from sources other than Edison without "integration" of the resource pursuant to the IOA.

2.28 Special Condition 12 arose, in part, out of an agreement between Edison and Vernon regarding the operation of diesel generators owned by Vernon. In July 1982, Edison and Vernon entered into an agreement under which Edison committed to file a tariff with the FERC which would provide Vernon with an

opportunity to operate generation projects within the City of Vernon, including Vernon's diesel generators.

2.29 Special Condition 12 was included within a proposed resale rate schedule filed by Edison with the FERC in October 1983. Under the terms of the July 1982 settlement, Vernon's diesel generators could be used by Vernon when they were available for capacity and associated energy. Under Special Condition 12, additional capacity and associated energy could be generated or imported by Vernon by giving certain notices to Edison, with the first notice due on or before July 1, 1985, for generation or imports commencing during the two-year period January 1, 1987 through December 31, 1988.

2.30 There is no provision for penalties if a resource noticed by a Resale City under Special Condition 12 is not contracted for or actually received by that City and no limit on the amount of a City's load that must be met by Special Condition 12 resources.

2.31 In June 1985, Vernon noticed approximately 27 MW of Special Condition 12 resources from outside the City boundaries, with credit to commence on January 1, 1987. Prior to January 1, 1987, Vernon requested, and Edison agreed (although not obligated to do so under Special Condition 12) that a purchase from CDWR could substitute for the 27 MW of resources from other utilities which Vernon had noticed. Edison provided Vernon firm transmission service on Edison's 220 kV network for the 27 MW of Special Condition 12 resources from CDWR.

2.32 In June 1987, Vernon gave notice for all of the Special Condition 12 resources that it felt it could handle for the period of January 1, 1989 through December 31, 1990. That included 98 MW of capacity and associated energy during the summer and 62 MW of capacity and associated energy during the winter from CDWR. Prior to the start of delivery of resources on January 1, 1989, Edison again permitted Vernon to substitute for certain Special Condition 12 resources previously noticed.

2.33 Vernon has used Special Condition 12 to reduce its dependence on Edison for its capacity and energy needs.

(f) *Interruptible Transmission Service*

2.34 On or about December 15, 1981, Nevada Power Company ("NPC") and Vernon entered into an Interconnection Agreement providing, in part, for the sale of non-firm energy by NPC to Vernon.

2.35 On or about January 5, 1982, Vernon and Edison entered into an agreement for the integration and interruptible transmission service for non-firm energy purchased by Vernon from NPC. The agreement was filed with the FERC and became part of Edison's rate schedules as of February 1, 1982.

2.36 During 1982 and 1983, Vernon imported significant quantities of non-firm energy from NPC under these arrangements.

2.37 On or about December 23, 1983, Edison and Vernon executed an agreement for the integration of, and interruptible transmission service for, non-firm energy purchased by Vernon from the CDWR.

2.38 The NPC and CDWR interruptible transmission service ("ITS") Agreement provided in part that the availability of transmission service "shall be determined at the sole discretion of Edison," and Edison reserved the right to interrupt or curtail such service "at any time and for any reason." Edison has entered into ITS agreements with the other Resale Cities that provide ITS on all of Edison's transmission lines. These agreements also provide for interruption "at any time and for any reason."

2.39 The form of interruptible transmission service contracts offered by LADWP include a provision that allows LADWP to interrupt or curtail such service "at any time and for any reason." One of Vernon's consultants, Mr. Brodie, admitted that interruptions of ITS for minimum load are not unusual in the industry and that the owner of transmission facilities is expected to have a priority of use of those facilities.

2.40 Although Edison's ITS contracts with Vernon and its other Resale Cities allow Edison to interrupt or curtail such transmission service "at any time and for any reason," Vernon has not presented any evidence that when Edison did interrupt

Vernon's transmission, that Edison did so for anticompetitive reasons.

(g) Vernon's bulk power resources

2.41 In 1983, Vernon bought nearly all of its electricity from Edison. By 1987, Vernon was purchasing less than one half of its power from Edison.

2.42 As of 1989, Vernon's non-Edison resources included the following: (1) a diesel plant with peaking capacity of approximately 21.5 MW; (2) entitlements of an average of approximately 71 MW of peaking power and associated energy from Hoover Dam; (3) a 10.6 MW interest in the Palo Verde Nuclear Generation Station; and (4) two gas turbines with a total peaking capacity of 11.2 MW. Vernon also purchases approximately 98 MW during the summer and 62 MW during the winter of capacity and associated energy from the CDWR, and 30 MW of capacity and associated energy from LADWP. In total, Vernon currently has capacity from non-Edison resources of approximately 180 MW during the summer and 145 MW during the winter.

2.43 Vernon's electric requirements at its peak are approximately 195 MW, so during the summer months, Vernon has its own non-Edison resources to obtain over 92% of its capacity.

2.44 In addition, Vernon is able to purchase economy energy during off-peak hours from non-Edison sources at the rate of approximately 70 MW.

2.45 Vernon operates its diesels, its Hoover power, CDWR, and LADWP purchases, and the gas turbines, pursuant to Edison's Special Condition 12; Vernon's Palo Verde ownership interest is integrated pursuant to the Edison-Vernon Palo Verde IOA.

2.46 Vernon is increasing its outside resources even beyond what it had as of 1989.

3. VERNON'S FORECLOSURE DAMAGE CLAIMS

3.1 In support of its foreclosure claims, Vernon alleges that Edison unlawfully restrained Vernon from purchasing bulk power from suppliers other than Edison by denying Vernon access to its transmission lines. Specifically, Vernon contends that Edison should have given the City additional transmission over the Pacific Intertie and over certain other EHV lines extending to the Southwest, as well as unconstrained transmission over Edison's 220 kV network for Vernon's purchases from CDWR. Vernon further alleges that as a result of this foreclosure, as set out in Claims I and II of Vernon's First Amended Complaint, the City was forced to purchase wholesale power from Edison at prices higher than it would otherwise have had to pay. Vernon claims that it was thus unable to compete with Edison in the provision of retail electric service.

3.2 Vernon calculates its damages resulting from the foreclosure as the difference between the rate Edison charged Vernon and that which Vernon alleges it could have paid if Edison had "foreclosed" Vernon's access to the transmission lines.

3.3 Mr. Whitfield A. Russell, an engineer testifying on behalf of Vernon, quantified these overcharge claims in five alternative damage scenarios. Pursuant to the procedural schedule established by the Court, Exhibit 2867 is the final version of Vernon's damage study and is the only one which could have been presented by Vernon at trial.

3.4 Vernon's damage study prepared by Mr. Russell includes three principal damage scenarios, *i.e.*, the Special Condition 12 capacity claims, the IOA capacity claims, and the energy-only claim. The two capacity claim scenarios each offer an alternative formulation, so that there are a total of five different damage models in the Vernon study.

3.5 These alternative calculations, according to Vernon's witness, produce damages ranging from a low of $14,969,341 under the so called "Energy-Only" calculation to a high of $59,574,440 under the base case "Capacity Damage" calculation. Damages are calculated for the years 1982 through 1987.

3.6 All five of the damage scenarios presented by Vernon assume that Edison is obligated to provide Vernon with a relative size share access to Edison's EHV transmission lines, and unconstrained access to Edison's 220 kV network. The relative size share access calculated by Mr. Russell is based upon the ratio of Vernon's load divided by Edison's total load, including the load of Vernon.

3.7 Under both of Vernon's IOA capacity damage scenarios, Vernon is assumed to be able to import new and additional capacity and energy into the Edison control area, and receive credit for capacity purchases, pursuant to the provisions of a hypothetical IOA, upon 18-months notice to Edison of the proposed additional capacity transactions.

3.8 Although Edison first made Special Condition 12 available to Vernon in June 1984, such that resources noticed pursuant to this provision could be imported to offset demand charges beginning in January 1987, Vernon's Special Condition 12 capacity damage scenarios assume that this provision would have been available for purposes of offsetting Vernon's demand charge by 1983 rather than 1987.

3.9 In summary, the only conduct of Edison from which Vernon claims quantifiable damages consists of: (1) the failure of Edison to provide Vernon with relative size share access to its EHV transmission lines and unconstrained access to its 220 kV network; (2) the failure of Edison to provide Vernon with an Integrated Operations Agreement containing terms acceptable to Vernon, including a provision requiring Edison to accept into its control area, and provide capacity credit for capacity imported on 18-months advance notice; and (3) the failure of Edison to have Special Condition 12 included in its FERC resale rate schedules four years earlier than this rate provision was included in Edison's FERC rate schedules.

3.10 Vernon's damage study does not segregate damages as to alleged foreclosure from any particular transmission line.

3.11 Vernon has also argued that Edison improperly interrupted transmission service provided to Vernon for purchases of non-firm energy from NPC and CDWR pursuant to the inter-

ruptible transmission service agreements between Vernon and Edison. Vernon has not, however, quantified any damages specifically arising from this alleged conduct.

3.12 Vernon's "relative size share" claim is premised on the argument that Vernon is entitled to direct relative size share access to Edison's EHV transmission lines, including Edison's entitlement on the Pacific Intertie and its transmission facilities linking Edison with the desert Southwest. The relative size share entitlement postulated by Vernon would give the City firm transmission service over Edison's EHV lines in an amount determined by first calculating Vernon's load as a proportion of Edison's total load and then multiplying this percentage figure by the megawatt capacity of the particular transmission lines. Vernon claims that Edison was obligated under the antitrust laws to offer this type of access even in the absence of a specific request by the City and even if Edison is unaware that access was desired.

3.13 The Court finds that Vernon has never made a formal request to Edison for relative size share firm transmission access.

3.14 In addition to this direct relative size share access, Vernon contends that it is entitled to unlimited access to Edison's 220 kV network provided there is sufficient capacity to meet the total demand, and if the grid is unable to handle all the demand, that the constraint on the system should be shared.

3.15 Edison admits that it has not given Vernon direct relative size share access to its transmission lines as assumed in Vernon's damage study.

3.16 If Edison granted Vernon relative size share access when Edison was fully utilizing its transmission lines to import low cost power, the result would be to shift the benefit of the low cost power to Vernon and away from Edison's other customers.

3.17 Exhibits A, B and C attached by Vernon to its "Double Dip" Motion demonstrate the shifting of benefits that would occur had Edison acceded to a Vernon demand for greater access to Edison's transmission lines.

3.18 Exhibit C is a specific example of how the type of access assumed by Vernon in its damage claims would discriminate in

Vernon's favor and against Edison's retail customers. Page 1 of that exhibit shows that the wholesale customer shares equally and proportionately in the benefits of Edison's low-cost imported energy. Pages 2 and 3 of that exhibit reveal how providing a 10% relative size share access, with the remainder purchased pursuant to an average cost-based wholesale rate, would discriminate in favor of the wholesale customers and against the retail customers. As can be seen on page 3, as a result of the "double dip,"[1] the energy costs of the wholesale customer are decreased, with additional costs imposed on the retail customers. This disproportionate access would result in the wholesale customer obtaining a higher percentage of its requirements from the low-cost power, while the retail customers would receive a lower percentage of their requirements from the same source.

3.19 To the extent the foregoing Findings of Fact are also Conclusions of Law, they are to be construed as Conclusions of Law as well.

B.

CONCLUSIONS OF LAW

4. STANDARDS FOR GRANTING SUMMARY JUDGMENT

4.1 Summary judgment is a useful tool for narrowing the issues to be tried in antitrust proceedings. *See Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986); *Richards v. Nielsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987); *Universal Analytics, Inc. v. MacNeal-Schwendler Corp.*, 707 F. Supp. 1170, 1173-74 *("Universal Analytics")*.

4.2 Summary judgment is appropriate in an antitrust case involving a regulated electric utility. *See City of Mt. Pleasant, Iowa v. Associated Electric Coop, Inc.*, 838 F.2d 268, 273 (8th Cir. 1988) (the court expressly declined to accept the plaintiff's

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[1]That is, access to low-cost energy both from direct transmission use and indirectly through Edison's resale rates.

contention that "a different, heightened standard for summary judgment applies in complex antitrust cases.").

4.3 A moving party is entitled to summary judgment when "there is no genuine issue as to any material fact" and the movant "is entitled to a judgment as a matter of law." *See* Fed. R. Civ. Proc. 56(c). Under the *Celotex* Court's interpretation of this rule, summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett, supra,* 477 U.S. at 322.

4.4 The Court concludes that there is no genuine issue as to any material fact, and that Edison's Foreclosure Motion can be decided as a matter of law. The Court further notes that Vernon appears to agree with Edison that in this case, the sufficiency of Edison's proffered business justification is a matter of law and is thus appropriate for resolution pursuant to Edison's Foreclosure Motion. Vernon explicitly states that "Edison's asserted business reasons for denying access to Vernon are insufficient as a matter of law." *Vernon's Statement of Genuine Issues,*[2] *Issue No. 4, at 3. See, id., Issue Nos. 5, 12-13, at 3-4.* Moreover, Vernon failed to submit any facts sufficient to controvert or raise a factual dispute underlying the issue of legitimate business justification. *See, e.g., Vernon's Opposition Memorandum at 22-27.*

5. ELEMENTS OF A § 2 CLAIM FOR MONOPOLIZATION AND ATTEMPTED MONOPOLIZATION

5.1 To prove the offense of monopolization under § 2, Vernon must show that (1) Edison possesses monopoly power in a relevant market, (2) Edison willfully acquired or maintained that power, and (3) Vernon suffered causal antitrust injury. *Oahu Gas Service, Inc. v. Pacific Resources, Inc.,* 838 F.2d 360, 363 (9th

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[2]"Vernon's Statement of Genuine Issues" refers to Vernon's Statement of Genuine Issues of Fact Submitted in Opposition to Edison's Foreclosure Motion.

Cir.), *cert. denied*, 109 S. Ct. 180 (1988) ("*Oahu Gas Service*"), *Catlin v. Washington Energy Co.*, 791 F.2d 1343, 1347 (9th Cir. 1986).

5.2 To prevail on a claim of attempted monopolization under § 2, Vernon must demonstrate that (1) Edison had the specific intent to control prices or destroy competition; (2) Edison engaged in predatory or anticompetitive conduct directed towards accomplishing that unlawful purpose; (3) there was a dangerous probability that Edison would succeed in its endeavors; and (4) Vernon suffered causal antitrust injury. *See California Computer Products, Inc. v. IBM Corp.*, 613 F.2d 727, 736 (9th Cir. 1979).

5.3 To show that Vernon's claims constitute § 2 violations under either theory, Vernon must show that these claims constitute anticompetitive conduct that caused antitrust injury to Vernon.

5.4 In its Foreclosure Motion, Edison assumed, solely for the purposes of the Foreclosure Motion, that there was competition between Edison and Vernon, that Edison had monopoly power in a properly defined market, and that Edison's transmission lines are essential facilities. For the purpose of ruling on this Foreclosure Motion, the Court also makes these assumptions, and makes no findings and has reached no conclusions on the issues of competition, monopoly power, or essential facilities.

5.5 In regard to the issue of whether Edison's transmission lines are essential facilities, the Court finds that there are factual questions on this issue, and that such factual questions required the denial of Vernon's Motion for Partial Summary Judgment on the Essential Facilities Claim (Vernon's "Essential Facilities Motion"). The Court notes, however, that credible arguments can be made that Edison's transmission facilities are not essential facilities within the meaning of the antitrust laws.

5.6 With respect to the issue of franchise competition, the Court finds that there are factual questions and that such factual questions required the denial of Vernon's Motion for Partial Summary Judgment on the Franchise Competition Claims (Vernon's "Franchise Competition Motion").

6. ANTITRUST OBLIGATIONS IMPOSED UPON A COMPANY WITH MONOPOLY POWER

6.1 There is no general unqualified duty for a firm possessing monopoly power to cooperate with its business rivals. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600.

6.2 A monopolist has no duty to reduce its prices in order to help consumers, *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 294 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), or any obligation to extend a helping hand to new market entrants or to help its competitors survive or expand their businesses, *California Computer Products, Inc. v. IBM, supra*, 613 F.2d at 744.

6.3 As the Ninth Circuit has recently acknowledged:

> [I]t is consistent neither with *Berkey Photo* nor with the body of antitrust law as a whole to say that a holder of lawful monopoly power must passively concede every time someone else demands the right to do some portion of what that firm does, regardless of whether the services at issue are performed within the scope of the lawfully acquired monopoly and regardless of whether the 'monopolist' is merely conducting itself in a way that any other (non-monopolist) firm would under the circumstances.

Catlin v. Washington Energy Co., 792 F.2d at 1347, quoting *Grason Electric Co. v. Sacramento Mun. Utility Dist.*, 571 F. Supp. 1504, 1517 n.17 (E.D. Cal. 1983).

6.4 There are certain occasions, however, when a court will impose affirmative obligations on a monopolist. *See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. at 601. Where the monopolist's competitor is the monopolist's customer as well, the antitrust laws may impose duties on the monopolist to ensure that the monopolist's conduct does not unjustifiably impair its customer's ability to compete. *See Olympia Equipment Leasing*, 797 F.2d at 376; *Oahu Gas Serv.*, 838 F.2d at 368.

6.5 Although affirmative duties are imposed on a monopolist, "[t]hese duties are not absolute, however; they arise only when there is no justification for refusing to aid a competitor." *Oahu*

Gas Service, supra, 838 F.2d at 368; *Aspen Skiing, supra,* 472 U.S. at 604-05. Thus, even if the monopolist has affirmative duties to its competitors, if the monopolist had a legitimate business justification for its conduct, the plaintiff cannot prevail on its claim of a violation of § 2. *See, e.g., Oahu Gas Service, supra,* 838 F.2d at 368; *Image Technical Service, Inc. v. Eastman Kodak Co.,* 90 Daily Journal D.A.R. 4702, 4705 (9th Cir. 1990); *Theee Movies of Tarzana v. Pacific Theatres, Inc.,* 828 F.2d 1395, 1400-1401 (9th Cir. 1987), *cert. denied,* 108 S. Ct. 1028 (1988). *See also, Universal Analytics, supra,* 707 F. Supp. at 1180.

6.6 Under this standard, even the presence of a predatory motive "will not make otherwise lawful conduct (i.e., conduct engaged in for a legitimate business purpose) unlawful." *Universal Analytics, supra,* 707 F. Supp. at 1180 (citation omitted). As the Ninth Circuit in *Oahu Gas Service* stated:

> Where a monopolist's refusal to aid a competitor is based partially on a desire to restrict competition, we determine antitrust liability by asking whether there was a legitimate business justification for the monopolist's conduct. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 U.S. 585, 105 S. Ct. 2847, 86 L.Ed.2d 467 (1985); *Dimidowich v. Bell & Howell,* 803 F.2d 1473, 1478 (9th Cir. 1986); *Drinkwine v. Federated Publications, Inc.,* 780 F.2d 735, 740 (9th Cir.), *cert. denied,* 475 U.S. 1087, 106 S. Ct. 1471, 89 L.Ed.2d 727 (1986).

Oahu Gas Service, supra, 838 F.2d at 368.

6.7 Under this view of the legitimate business justification defense, the Ninth Circuit has found a variety of conduct not to be in violation of the antitrust laws. *See, e.g., Oahu Gas Service,* 838 F.2d at 360 (monopolists-suppliers' decision not to expand refinery justified where investment required would have resulted in negative return because of price controls); *The Jeanery, Inc. v. James Jeans, Inc.,* 849 F.2d 1148, 1159-60 (9th Cir. 1988) (improvement of the defendant's distribution network); *Mozart Co. v. Mercedes-Benz of North America, Inc.,* 833 F.2d 1342, 1349 (9th Cir. 1987), *cert. denied,* 109 S. Ct. 179 (1988) ("*Mozart*") (quality control over the products and services pro-

vided by the defendant); *Drinkwine v. Federated Publications, Inc.*, 780 F.2d 735, 740 (9th Cir. 1985), *cert. denied*, 475 U.S. 1087 (1986) (same).

7. THE CONDUCT CHALLENGED BY VERNON DOES NOT VIOLATE § 2 OF THE SHERMAN ACT

(a) *Vernon's Relative Size Share Access Claim*

7.1 Even assuming that Edison has monopoly power and viewing Edison's transmission facilities and rights as an "essential facility", Vernon cannot sustain its allegations of an antitrust violation premised on Edison's refusal to provide relative size share transmission access. Under the essential facilities doctrine, Edison is only required to give Vernon reasonable access to its transmission network. *See, e.g., Southern Pacific Communications Co. v. AT&T Co.*, 740 F.2d at 1009; *In Re Air Passenger Computer Reservations Systems Antitrust Litigation*, 694 F. Supp. 1443, 1451 (C.D. Cal. 1988). Reasonable access does not include that which would harm Edison's other customers or which would be impractical. *Southern Pacific Communications Co. v. AT&T Co., supra*, 740 F.2d at 1009, quoting *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992-93 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).

7.2 Moreover, even complete denial of access to an essential facility is not an antitrust violation where there is a legitimate business justification for the denial. *See, e.g., Image Technical Service, Inc. v. Eastman Kodak Co., supra*, 90 Daily Journal D.A.R. at 4705; *Becker v. Egypt News Co., Inc.*, 713 F.2d 363, 366 (8th Cir. 1983); *Venture Technology Inc. v. Nat'l Fuel Gas Co.*, 1980-81 Trade Cas. (CCH) ¶ 63,780, at 78-169 (W.D.N.Y. 1981), *rev'd on other grounds*, 685 F.2d 41 (2d Cir.), *cert. denied*, 459 U.S. 1007 (1982).

7.3 Under the standards articulated in the foregoing cases, Edison's failure to allow Vernon "relative size share" access to Edison's EHV lines is not unlawful anticompetitive conduct. Vernon has conceded that if Edison granted Vernon the access it has demanded, the costs for Edison's other customers would increase. Even assuming competition exists between Edison and

Vernon, Edison is not obligated by the antitrust laws to confer a benefit on Vernon at the expense of its own customers. *Town of Massena v. Niagara Mohawk Power Corp.*, 1982-82 Trade Cases (CCH) ¶ 63,526 (N.D.N.Y. 1980), *see also, Hecht,* 570 F.2d at 992-93 ("antitrust laws do not require that an essential facility be shared if such sharing would be impractical or would inhibit the defendant's ability to serve its customers adequately").

7.4 Edison's justification for not granting Vernon relative size share access is distinguishable from that proffered by the utility, and rejected by the Supreme Court, in *Otter Tail Power Co. v. United States,* 410 U.S. 366, 372 *reh'g denied,* 411 U.S. 910 (1973). In *Otter Tail,* the Court addressed a situation where the Otter Tail Power Company had refused to sell wholesale power to municipal systems and refused to wheel power as well. Otter Tail's total refusals were motivated by an intent to retain the municipals as all-requirements customers. This result was achieved by these absolute refusals to deal on an "essential facility." Otter Tail did not argue that it lacked excess transmission capacity to provide transmission service or that its transmission system could not accommodate new imports wheeled into its municipal customers. Otter Tail's only justification for its refusals to deal was the desire to keep its municipals (and future municipals) as captive customers.

7.5 The facts now before this Court are not analogous to those of *Otter Tail.* First, Edison has not refused to sell wholesale power to Vernon. Edison has had in place a partial requirements resale rate and there is no evidence that Edison ever threatened, or even suggested, that it would terminate that service. Second, Edison has not refused to wheel power to Vernon. As is stated above, Edison has provided Vernon with significant transmission service (or "wheeling") for outside resources, and as a result, Vernon is now buying relatively little power from Edison. Most of Vernon's power needs are being met from outside resources "wheeled" to Vernon by Edison. Third, Edison's denial of access to its transmission system was motivated by a desire to benefit its own customers rather than just Vernon. This is a legitimate business justification.

7.6 As a matter of law, Edison's conduct with respect to transmission has not been unreasonably exclusionary.

(b) *Vernon's IOA Claim*

7.7 The issue in regard to the IOA claim is not whether Edison can foreclose access to outside resources since it is clear that Edison has offered Vernon an IOA and access to outside resources. An IOA and access has been made available to Vernon on the same terms and conditions as for the other Resale Cities; Vernon made a decision to restrict its own IOA to its Palo Verde purchases.

7.8 As with Vernon's demand for relative size share access, to the extent that Edison had a duty to integrate Vernon's power purchases, that duty is not absolute; it is limited by Edison's legitimate business justifications.

7.9 Even assuming an obligation of Edison to furnish a different IOA than what was actually offered to Vernon, the Court concludes that Edison had a legitimate business justification for not providing Vernon with an IOA with only an 18-month notice period for capacity additions to the Edison control area.

7.10 The Court further notes that Vernon has previously asserted, and the FERC has concluded, that a three-year notice period is appropriate, and hence antitrust liability cannot be premised in this action based upon an IOA that has only an 18-month notice period.

7.11 Vernon's damage study improperly assumes that the failure of Edison to provide an IOA with an 18-month notice provision was unlawful, since the failure to provide Vernon with an IOA with an 18-month notice provision is not an antitrust violation.

7.12 Vernon has presented no evidence which raises a triable issue of fact with respect to the IOA.

(c) *Vernon's Special Condition 12 Claim*

7.13 In that the Court has concluded that there is and has been a legitimate business justification for Edison refusing to

allow the import of capacity resources into the Edison control area on less than three-years' notice, the Court further concludes that Edison was under no obligation under the antitrust laws to offer Special Condition 12 to Vernon.

7.14 Vernon's Special Condition 12 claim is analogous to that raised by the plaintiff in *Olympia Equipment Leasing Co. v. Western Union Telegraph Co., supra,* 797 F.2d at 376, and was rejected by the court in that case. In *Olympia,* the plaintiff alleged that Western Union's withdrawal of assistance in marketing telex equipment constituted a Sherman Act § 2 violation. The court rejected the plaintiff's contention. Reasoning that a monopolist has no generalized duty to extend a helping hand to its competitors. The court concluded that Western Union's withdrawal of voluntary assistance could not possibly constitute a § 2 violation.

> If a monopolist does extend a helping hand, though not required to do so, and later withdraws it as happened in this case, does not incur antitrust liability? We think not.... Since Western Union had no duty to encourage the entry of new firms into the equipment market, the law would be perverse if it made Western Union's encouraging gestures the fulcrum of an antitrust violation.

Id., 797 F.2d at 376.

7.15 This rationale applies equally to Vernon's contentions concerning the availability of Special Condition 12. Here, Edison had no duty under the antitrust laws to provide Special Condition 12 treatment to Vernon. Having no such obligation, its failure to provide Special Condition 12 earlier than it actually did cannot be the basis of a § 2 violation.

7.16 The Court concludes that Edison had a legitimate business justification for not implementing Special Condition 12 earlier than it did.

7.17 Vernon's damage study improperly assumes that the failure of Edison to initiate Special Condition 12 earlier than it did was unlawful, since the failure to initiate Special Condition 12 earlier was not an antitrust violation.

7.18 Vernon has presented no evidence which raises a triable issue of fact with respect to Special Condition 12.

7.19 Because two of Vernon's damage scenarios are predicated upon the existence of Special Condition 12 years before it was actually offered, the conduct underlying these scenarios is not a violation of § 2 of the Sherman Act.

(d) *Vernon's Interruptible Transmission Service Claim*

7.20 The granting of summary judgment with respect to Vernon's contentions based upon purportedly improper denials, interruptions, or curtailments of ITS for nonfirm energy is mandated on three separate grounds.

7.21 First, Vernon has failed to quantify any damages arising from any of these interruptions. As the Court explained in its "Memorandum of Decision" (at 14-16), a plaintiff must show some measurable damages flowing from an antitrust injury in order to meet the requirements of § 4 of the Clayton Act, 15 U.S.C. § 15. Vernon has failed to make this showing.

7.22 Second, Vernon's concerns in regard to interruptions at best involve the interpretation of contract language giving Edison discretion as to when interruptions can be made. A contractual dispute as to the reasonableness of conduct is not enough to support an antitrust claim. *See Universal Analytics, supra,* 707 F. Supp. 822, 828 (N.D. Cal. 1986). *See, also, Colorado Interstate Gas Co. v. Natural Gas Pipeline Co.,* 19892 Trade Cas. (CCH) ¶ 68,751, at 61,950 (10th Cir.).

7.23 Third, the Court concluded that Vernon has failed to demonstrate that Edison's reasons for interrupting were not legitimate.

8. THE CHALLENGED CONDUCT VIEWED SEPARATELY AND AS A WHOLE

8.1 In examining Edison's conduct that is alleged to give rise to damages, the Court has concluded that the challenged conduct does not constitute a violation of § 2 of the Sherman Act. None of the challenged conduct individually amounts to an antitrust

violation and viewing the conduct in its totality does not change any of the conclusions as to the propriety of the conduct.

8.2 At times in its opposition, Vernon argued that a number of other Edison alleged acts or conduct constituted evidence of violations of the antitrust laws. Vernon, however, failed to link any of these other alleged acts to any quantifiable damages, and Vernon makes no claim of damages or injury arising from these alleged acts. Nor has Vernon presented any arguments to demonstrate that any such acts or conduct has any sort of synergistic effect when viewed as a whole.

8.3 Accordingly, for the reasons set out at pages 19-20 of the Court's Memorandum of Decision, the Court concludes that summary judgment in favor of Edison and against Vernon is appropriate.

9. CONCLUSIONS

9.1 To the extent that the foregoing Conclusions of Law are also Statements of Fact, they are intended to be Findings of Fact as well.

9.2 Defendant Edison is entitled to summary judgment on Vernon's foreclosure damage claims in this action.

9.3 Having granted summary judgment in favor of defendant Edison and against plaintiff Vernon on all damage claims in this action and made the above stated Findings and Conclusions, the Court asked plaintiff Vernon to advise the Court of what remained for trial. Vernon advised the Court that the foregoing Findings of Fact and Conclusions of Law address and dispose of all remaining claims of Vernon herein, including those in Claim I of the First Amended Complaint for which Vernon is seeking relief. As a consequence, judgment in this action should now be entered in favor of defendant Edison and against plaintiff Vernon, with Edison to recover its costs of suit herein.

Dated: August 30, 1990

MARIANA R. PFAELZER

Mariana R. Pfaelzer
United States District Judge

CERTIFICATION OF SERVICE

I hereby certify that I have served the foregoing APPELLANT'S DOCKET SHEET on all parties of record in this proceeding, Civil No. 90-56281, by placing a copy of the document in a properly addressed envelope and sending by overnight courier to the following parties or attorneys of parties:

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DATED: December 12, 1990

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Attorneys of Record for
Plaintiff-Appellant City of Vernon

CASE NO. CV 83-8137 MRP

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CITY OF VERNON, CALIFORNIA,
Plaintiff,

v.

SOUTHERN CALIFORNIA EDISON COMPANY,
Defendant.

JUDGMENT

The Court having granted Edison's Motions for Summary Judgment on plaintiff's foreclosure claims, rate claims and group boycott claims, and having filed its Memorandum of Decision and Findings of Fact and Conclusions of Law thereon, and the issues having been duly heard and a decision having been duly rendered,

IT IS HEREBY ORDERED AND ADJUDGED that the plaintiff City of Vernon take nothing in this action, that this action be dismissed on the merits and with prejudice, and that defendant Southern California Edison Company shall recover from plaintiff City of Vernon its costs in this action in the amount of $.

DATED: August 30, 1990

Mariana R. Pfaelzer
United States District Judge

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NO. 83-8137-MRP (MCX)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CITY OF VERNON,
Plaintiff,
v.
SOUTHERN CALIFORNIA EDISON COMPANY,
Defendant.

ORDER DENYING VERNON MOTION FOR RECONSIDERATION

HEARING: October 15, 1990
10:00 a.m.
Courtroom of the Honorable Mariana R. Pfaelzer
TRIAL DATE: None

The motion of plaintiff City of Vernon "For Reconsideration of this Court's Granting of Defendant Southern California Edison Company's Motion for Summary Judgment on Plaintiff's Foreclosure Damage Claims" (the "Motion") came on for hearing

before the Court on October 15, 1990, with counsel for both parties appearing. After hearing and considering the arguments of counsel and the papers filed in connection with this Motion, and the Court having determined that there is not good cause for the granting of the Motion, the Motion of the plaintiff City of Vernon is hereby denied.

DATED: October 22, 1990

Mariana R. Pfaelzer
United States District Judge

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By_____
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City of Vernon

No. 90-1544

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1990

SOUTHERN CALIFORNIA EDISON COMPANY,
Petitioner
vs.
FEDERAL ENERGY REGULATORY COMMISSION,
Respondent
FILED July 5, 1991

ORDER

Upon consideration of petitioner's motion for voluntary dismissal and it being represented that no opposition thereto will be filed, it is

ORDERED that petitioner's motion be granted. The Clerk is directed to send a certified copy of this order to respondent in lieu of formal mandate.

FOR THE COURT:
Constance L. Dupré, Clerk

By: /s/ MARYANNE McMAIN
MaryAnne McMain
Deputy Clerk

[27 FERC ¶ 63,053]

Southern California Edison Company, Docket No. ER81-177-002 (Phase II) Initial Decision

(Issued May 18, 1984)

Jacob Leventhal, Presiding Administrative Law Judge

Procedural History

The genesis of this proceeding lies with a rate increase tendered for filing by Southern California Edison Company (Edison or Company) on December 16, 1980 . . . . The instant proceeding, entitled Phase II, was severed from the general rate filing after Vernon's request for phasing, dated March 17, 1982, was granted on May 3, 1983 . . . .

Essentially, Phase II was established to determine the reasonableness of the Integrated Operations Agreement (IOA), a series of identical agreements which Edison has entered into independently with Cities. The IOA is a document which enumerates the services to be provided by Edison to its customers and dictates the terms and conditions of those services. Acceptance of the IOA has been treated by Edison as a condition precedent to a customer's receipt of partial-requirements service. Vernon does not presently receive such service but is desirous of becoming a partial-requirements customer of Edison's. Vernon, however, takes issue with the terms of the IOA proffered by Edison in return for rendering the partial-requirements service. Vernon maintains that this IOA, which is identical to those already in existence with Cities, contains provisions which are unreasonable and onerous. Cities have joined with Vernon in requesting a major alteration of the IOA.

* * *

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II. Amount of Energy Available Under Scheduled TOU-R When a City Capacity Resource Is Not in Operation

The Joint Statement of Issues (Exhibit 302) poses the issue as follows:

> Is the method in the IOA for establishing the responsibility for meeting a city's load requirements a fair and reasonable approach, or does this method result in unfair and unreasonable restrictions on the amount of energy which can be purchased by a city under Schedule TOU-R?

This issue involves Sections 15.1.2, 16.2, and 16.2.2.1 of the Integrated Operations Agreement (IOA). The Cities, who are signatories of the IOA, and Vernon, which is not a signatory, suggest an amendment of the terms of these sections on the ground that they result in an unjust, unreasonable, and discriminatory rate. The problem, more concisely, concerns the provisions of these sections which provide that the amount of energy available to a city each hour under the partial-requirements rate schedule TOU-R shall be the total energy requirement of the city during that hour reduced by the greater of (i) the energy during that hour from the city's integrated resources, or (ii) the amount of energy capability associated for that hour with the then effective capacity credit.

Under the terms of the IOA, a city's own generation units are integrated with Edison's capacity. The capacity credit is calculated by taking the rated capability of those units and reducing it by the amount of reserve the city contributes to the Edison system.

The critical problem arises when a city's generating facilities are closed down for periodic maintenance, repair, or any other reason. Then, the IOA provides that the city shall purchase from Edison "contract energy." Contract energy is based upon the incremental costing concept which assumes that the use of Edison's facilities consumes the most expensive fuel.

According to Edison, the IOA divides the load of a city into two parts with the capacity credit as the dividing line. Up to the limit of its capacity credit, the city is responsible for supplying its own energy needs. If it cannot do so, then it may either replace the energy from

[65,196]

some other source or purchase contract energy from Edison. This is a below-the-line transaction.

For energy requirements above the capacity credit, the city is charged on an average cost basis. This is an above-the-line transaction.

Edison defends this practice on the ground that the city is not paying a demand charge for energy within the limits of its capacity credit. If this provision were to be eliminated, Edison asserts that the cost of maintaining the utility's capacity would be passed on to other customers and therefor would be unfair.

* * *

[65,197]

* * *

Ruling

* * *

Thus the question is: Do the partial-requirements customers taking energy under the IOA and the TOU-R schedule pay the demand charge associated with the capacity credit?

The testimony and the briefs deal with the issue at some length. However, at the core of the controversy is whether the demand charge paid by the partial-requirements customers under the IOA and the TOU-R schedule include capacity required to replace the customer's own generation for which it has received a capacity credit. If a demand charge has been paid, the customer is entitled to the energy up to the limit of the demand at average system cost.

* * *

I agree with Staff that the partial-requirements customer should be able to purchase the maximum amount of energy

[65,198]

each hour associated with the maximum demands it imposes on the Edison system as reduced by the capacity credit it receives. I similarly agree with Staff that incremental pricing is appropriate for customers who have not paid their fully allocated costs.

* * *

Edison attempts to distinguish the present proceedings from either *Kansas* or *Northern*. Edison argues that the latter case involved a true capacity reservation which prompted the Judge to find that the limitation was not cost justified and would result in an overrecovery of energy costs. However, the decision also turned on the proposition that a customer is entitled to the energy for which a demand charge has been paid.

The argument made by Edison that *Northern* involved another type of capacity reservation is also not convincing. Although the details of the tariff provision differ from those in the present proceeding, the principle enunciated is the same. If the partial-requirements customer pays demand charges on the same basis as the full-requirements customer, it should be entitled to the same energy charges up to the limit of the demand charge.

Edison has complete control of the dispatch of Cities' generating units since their units are integrated with Edison's units. Edison operates the Cities' units according to control area requirements. Edison does not schedule power to the Cities like it does with utilities outside its control area. (Ex. 367-T at 9-11.) Since Edison does not operate Cities' generating units according to Cities' requirements, its premise that the IOA's capacity credit provision changes the character of the Cities-Edison relationship is not accurate. In reality, Cities' relationship with Edison is always that of a utility-customer and never one of utility-to-utility. Edison is responsible for supplying all of Cities' energy needs — and thus all energy within the limit of the demand charge should be supplied on an average cost basis.

The Cities, with generation, are in fact full-requirement customers, and they are properly receiving the same TOU-R rate as a customer without generation. Granting a demand credit for the use of a city's generating unit does, by definition, classify it as a partial-requirements customer, but only on paper. In *Northern* and *Kansas*, the Cities there operated their generation independently of the suppliers. A partial-requirements customer of Edison does not truly operate its generation as baseload or peaking since Edison has complete control over the customer's generation. Edison operates these units as if they were owned by Edison. (Id. at 9.) For the use of that generation, the Cities obtain a credit against its demand charge. But all of a city's load is part of the control area load, whether or not it has its own generation, and Edison is responsible for the entire control area load.

I find that adoption of Staff's proposal will eliminate the undesirable portion of the IOA relating to this issue.

III. City Contribution to Installed Reserves

Section 12.2 of the IOA provides that the city's contribution to installed capacity reserves (expressed as a percent of the rated capability of the city's capacity resources) is determined annually and shall be equal to the average of the five annual reserve margins (expressed as a percentage of annual peak) of the combined firm loads of the parties planned for the next five years.

* * *

The nub of the dispute is really whether the price the Cities are paying for the service received is higher than warranted. Under the

IOA, a city's TOU-R billing demand is reduced by a capacity credit. This credit is computed by subtracting the reserve margin from the rated capability of the city's generation. Thus, a higher reserve margin results in a lesser capacity credit with a resulting greater billing demand.

Cities, Vernon, and Staff object to the method used and the calculation of the reserve margin for a city. The opposition notes that for its own reserve, Edison uses 18%+ or −2% applied to its load to convert the percent reserve to kilowatts. The Edison percentage is a target reserve used for planning, not billing. On the other hand, the projected reserve percentage directly affects the capacity credit and consequently the cost of energy to the cities. Thus, they and Staff contend that for billing purposes a precise standard is needed for application to the cities. They propose a flat eighteen percent, the center point of the band used by Edison for its own reserve calculation. The eighteen percent is to be applied to the city's load, not capacity. If conditions change, as it is recognized could occur, the reserve margin can be amended in future rate proceedings. (Staff I.B. at 41-45.)

* * *

Ruling

[65,200]

The formula used to convert percent reserve requirements to kilowatts should be the same for a city as it is for Edison. Under the proposal by Vernon, supported by Staff, the city's capacity credit is used as a proxy for the load of the resale city and thus applies the percentage to the capacity credit. This is a reasonable method and is adopted here.

The proposal by Cities, Vernon, and Staff for the application of eighteen percent to the Cities' load to ascertain the required reserve margin leads to a reasonable result and is also adopted.

Section 12.2 will be amended accordingly.

* * *

[65,201]

VI. Qualifications for Integration of City Capacity resources

VII. Procedures for Integration of City Capacity Resources

VIII. Qualifications for Integration of City Transmissions Facilities

Issues VI, VII, and VIII present questions as to the reasonableness of various provisions of Section 8 of the Integrated Operations Agreement pertaining to the qualifications and procedures for integrating city capacity resources and transmission facilities. Although these three issues have been individually briefed by some of the parties, they will be discussed together under this heading since they are similar in content.

[65,202]

Section 8.1.2.1

Section 8.1.2.1 is the first of these provisions to be discussed by the parties. It reads as follows:

> A City Capacity Resource proposed by City shall be of appropriate size, type, reliability, design and operating characteristics and shall be capable of performing in a manner equivalent to Edison Capacity Resources.

* * *

Ruling

Rather than clarifying the qualifications for integration of a city capacity resource, Edison's proposal would create more ambiguity. Not only would it be extremely difficult to ascertain whether the California standard has been met, as Vernon and Staff point out, it does not add anything of value to "good utility practice." Section 8.1.2.1 as it stands now, is also unacceptable. It leaves to much discretion in Edison's hands for rejecting a proposed integration. At the same time it creates an undue burden on a city to try to duplicate Edison's facilities. Accordingly, the proposal put forth by Staff, Vernon, and Cities is adopted.

* * *

. . . On balance, the existing provisions are not unfair and the recommended changes are rejected.

Section 8.1.3.3

Section 8.1.3.3 is controversial for much the same reason as Section 8.1. Section 8.1.3.3 states:

> Within 60 days of the later of (i) receipt by Edison of the information on a proposed City Capacity Resource pursuant to Section 8.1.3.1 or (ii) the agreement on Transmission Facilities as required by Section 8.1.2.5, Edison shall inform City in writing as to its decision regarding acceptance for integration of the proposed City Capacity Resource. If such proposed City Capacity Resource meets the qualifications for integration, Edison shall use its best efforts to integrate the proposed City Capacity Resource. If such proposed City Capacity Resource meets the qualifications for integration, Edison shall use its best efforts to integrate the proposed City Capacity Resource. If Edison concludes that the proposed City Capacity Resource does not meet the qualifications for integration, Edison shall so inform City of Edison's opinion and shall, based upon Edison's preliminary studies, fully state in detail the reasons for its conclusion. Thereafter, within 30 days following a request by City, Edison shall make available for examination by City, the plans and specifications for similar Edison existing or planned capacity resources.

* * *

Ruling

The request that Edison "use its best efforts" to integrate be deleted is granted for the same reason it was granted with respect to Section 8.1. Its presence connotes an excessive amount of discretion in the integration determination. However, there is no merit to Vernon's other complaints. The phrases objected to are not onerous. Accordingly, Section 8.1.3.3 will remain in effect as is, except that Edison's obligation to integrate shall be absolute if the proposed city capacity resource meets the qualifications for integration.

* * *

[65,208]

* * *

[65,212]

XIII. Peaking and Intermediate Capacity

Issue XIII has been set forth in the Joint Statement of Issues as follows:

> Whether the IOA should be revised to cover the City's peaking and/or intermediate generating facilities and, if so, what the revision should be.

This issue has arisen due to the IOA's failure to provide for peaking or intermediate generating facilities, stemming from its inability to differentiate between baseload, intermediate, and peaking units.

Cities, Staff, and Vernon are in accord that the root of the problem lies with the energy restrictions imposed by IOA Section 15.1 and the contract energy provision in Section 16.2. Accordingly, they all agree that the modifications to the above IOA sections proposed in Issues II and IV would alleviate the flaws addressed under this heading as well.

Edison, while apparently conceding that a revision is required in order to allow a city to make economic use of peaking and intermediate facilities, disagrees with the solution offered by Cities, Staff, and Vernon.

* * *

The opposition of Cities, Vernon, and Staff is well taken. The rulings made on Issues II and IV dispose of the problem posed here. Edison is urging the addition of a new section to the IOA by the adoption of one of three alternative suggestions. They maintain, and I agree, that the problem has become moot. Further change is not necessary.

The proposed addition to the IOA sponsored by Edison is rejected.

Findings and Conclusions

Upon consideration of the evidentiary record and the briefs in this proceeding, it is found and concluded:

(1) Southern California Edison is a public utility under the Federal Power Act.

(2) The Integrated Operations Agreement herein involve sales of electric energy and are subject to the jurisdiction of this Commission.

(3) The sections of the Integrated Operations Agreement shall be modified in compliance with the rulings made in this decision.

(4) The terms and conditions of service contained in the agreements as modified by the rulings made above have been shown to be just and reasonable and otherwise lawful.

[41 FERC ¶ 61,188]

Southern California Edison Company, Docket No. ER81-177-002 (Phase II)
Opinion No. 289; Opinion and Order on Initial Decision
(Issued November 19, 1987)

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

[Note: Initial Decision of the Presiding Administrative Law Judge, issued May 18, 1984, appears at 27 FERC ¶ 63,053]

[Opinion No. 289 Text]

I. Introduction and Summary

The case commenced on December 16, 1980, when Southern California Edison Company (Edison) filed for a general rate increase for firm service to its wholesale customers. Subsequently, the proceeding was separated into two phases. Phase I involved various cost-of-service and rate design issues.[1] The instant proceeding, Phase II, deals with the reasonableness of an Integrated Operations Agreement (IOA) between Edison and certain municipal customers.

The IOA is a generic agreement which the Cities of Anaheim, Riverside, Banning, Colton and Azusa, California (Cities) have each entered into as a precondition to receiving partial requirements service from Edison under rate schedule TOU-R. The City of Vernon, California (Vernon) has also been offered partial requirements, integrated operations service similar to that provided to Cities, but disputes the reasonableness of the IOA which has been offered to Vernon by Edison. Cities join Vernon in its dispute with Edison over specific provisions of the generic IOA. Cities'

[61,490]

existing IOAs with Edison allow them existing IOAs with Edison allow them to: receive capacity and energy credit for resources they may integrate with Edison's system; pay TOU-R rates when these integrated resources meet defined availability, scheduling and reserve requirements; purchase generally higher priced contract energy[2] or replacement capacity when the integrated resource requirements are not met; participate to some extent in partial ownership of Edison's new generating units; and receive various other integrated operations services and rights. The IOAs are intended to provide a practical procedure by which Cities can meet some or all of their electric loads through acquisition of non-Edison resources, while remaining within Edison's control area.

Vernon is also eligible to receive partial requirements service under rate schedule TOU-R. Vernon has not signed the same type of "generic IOA" entered into by Cities, but does have a resource-specific IOA with Edison for purposes of integrating its interest in the Palo Verde Nuclear Generation Station.[3] Additionally, Vernon owns diesel generators which are nonintegrated and operate on its side of Edison's billing meters. Vernon does not have a broad agreement with Edison for integrated operation of other resources.

This proceeding is presently before the Commission on exceptions to an Initial Decision in Phase II.[4] Briefs On and Opposing Exceptions were filed by Cities, Edison, Vernon[5] and the Commission trial staff (staff).

There are ten issues before the Commission on exceptions, as follows:[6]

I. the standard and burden of proof to be applied in modifying the IOAs;

II. the amount of energy available under Schedule TOU-R when a City capacity resource is not in operation;

III. the City contribution to installed reserve;

IV. the energy dispatched by Edison from City's reserve capacity;

VI. the qualifications for integration of City capacity resources;

VII. the procedures for integration of City capacity resources;

VIII. the qualifications for integration of City transmission facilities;

IX. the replacement capacity;

XI. the contract energy pricing; and

XIII. the peaking and intermediate capacity.

II. Discussion

We affirm the Judge with additional discussion on Issues I and II. We affirm the Judge on other grounds on Issue IV. We reverse the Judge on Issues VII and XIII. We summarily affirm the Judge on Issues III, VI, VIII, IX and XI.

A. ISSUE I — The Standard and Burden of Proof to be Applied in Modifying the IOAs

The issue presented is what standard applies when Edison's customers, i.e., Cities, seek to modify their executed contracts, and who bears the burden of proof. We summarily affirm the Judge's ruling concerning the standard and burden of proof with respect to Vernon. We also summarily affirm the Judge's ruling

that Cities can challenge individual provisions of the IOA rather than having to show that the IOA in

[61,491]

"its totality is unreasonable."[7] We affirm the Judge's ruling on Issue I subject to the following clarification of his discussion on the *Mobile-Sierra* doctrine.[8]

Mobile-Sierra establishes the applicable standard governing rate increases which may be allowed in cases where the utility and the customer have entered into a contract in which the rate is fixed for the life of the contract or some other specified period. Under *Mobile-Sierra*, a utility with such a fixed-rate contract cannot file for a rate increase[9] under section 205 of the Act that is contrary to the contract. It can obtain relief under section 206 of the Act only if it can show that the rates under the contract are "so low as to adversely affect the public interest — as where it might impair the financial ability of the public utility to continue its service, cast upon other customers an excessive burden, or be unduly discriminatory."[10]

The Judge stated that Cities "are required to show that the provisions of the contract are not in the public interest because the terms are unjust and unreasonable."[11] He ruled that the proper method of challenging Cities' executed IOAs is under section 206 of the Act where the burden is on Cities and staff as complainants to establish a *prima facie* case that the provisions are unjust and unreasonable. However, the Judge also ruled that the ultimate burden of persuasion as to the justness and reasonableness of the terms lies with Edison.[12]

* * *

Edison states that the IOA provides only Edison with the option, in limited circumstances, of seeking to modify the rates in the IOA, and that there is no right reserved by either party to seek modification of other provisions in the IOA. Edison argues that in the absence of any reserved right to seek changes, the terms and conditions of service may be modified only upon a showing that they are against the public interest.

We do not agree. In determining the meaning of the contract, general principles of contract interpretation apply. As the court said in *Papago Tribal Utility Authority v. FERC* in a rate revision contest, " '[i]n the absence of ambiguity the intent of the parties to a contract must be as ascertained from the language thereof without resort to parol evidence or extrinsic circumstances.' "[16] The IOA does not contain any provision which indicates that Cities waived their right to seek modification of the IOAs' terms and conditions under section 206 of the Act.

* * *

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We agree with the Judge that Cities and staff have the burden of coming forward and establishing a *prima facie* case that the provisions in the IOA are unjust or unreasonable. However, as the Judge further correctly noted, section 206 of the Act does not refer to burden of proof. Thus, it is controlled by section 556(d) of the Administrative Procedure Act, which imposes the burden on "the proponent of a rule or order,"[23] but the burden imposed is one of coming forward with a *prima facie* case, not the ultimate burden of persuasion.[24] Therefore, once Cities and staff present a *prima facie* case for relief, the burden shifts to the respondent Edison to make a persuasive defense.[25]

B. ISSUE II — Amount of Energy Available Under Schedule TOU-R When A City Capacity Resource Is Not In Operation

We affirm the Judge's ruling on Issue II, with the following discussion. The issue presented is whether the IOA places unjust or unreasonable restrictions on the amount of energy which can be purchased by a city under rate schedule TOU-R.

* * *

Edison also states that even if a city's capacity resources were idle during Edison's monthly system peak hour, providing reduced reliability benefits, in the next rate case Edison would not be able to allocate additional demand costs to the wholesale class since a city's capacity credit is always subtracted from the class 12 CP

demand for cost allocation purposes. Edison thus views its relationship with the partial

[61,493]

requirements cities as fundamentally different from that with its other customers, warranting the pricing of energy corresponding with idle city capacity resources at incremental costs. What Edison overlooks, however, is that a city contributes reserves along with its capacity resources to compensate Edison for unforeseen and planned unit outages.

Staff argues that the situation described by Edison is extreme in that a city's use of a disproportionately large amount of average cost energy would occur, if at all, only during relatively short intervals. The existing IOA prices energy associated with any unavailable city capacity, during every hour, at Edison's incremental energy cost. As stated by staff: "[W]hile there is a kernel of truth to Edison's claim that staff's remedy is not totally perfect, Edison's alternative remains fundamentally unfair to the IOA cities."[28] We agree, and believe that staff's proposed remedy to this problem, adopted by the Judge, is the most reasonable one presented in the instant proceeding.

C. ISSUE IV — Energy Dispatched by Edison From City's Reserve Capacity

The issue presented is whether Edison derives a benefit from energy associated with a city's reserve capacity that is not adequately reflected in the IOA and, if so, whether revision of the IOA is necessary. The Judge stated that Edison receives a cost benefit[29] from dispatching a city's reserve capacity under the IOA, but that the benefit has been virtually eliminated through his ruling in Issue II. Furthermore, he stated that any residual inequity would be *de minimis*.[30] Although we agree with the results of the Judge's ruling, we do so on different grounds.

We agree with Vernon[31] that the Judge's ruling on Issue II does not moot Issue IV; however, we do not believe Vernon's proposed banking arrangement[32] is an appropriate remedy. For reliability purposes, Edison must maintain at least a minimum reserve level

on its system. Under the IOA, a city is required to contribute reserve capacity for resources integrated with Edison's system, a principle uncontested in this proceeding. Because it has adequate system reserves, Edison can operate Cities' resources, including reserve capacity, to achieve a decrease in system energy costs. The opportunity to realize this benefit, however, is derived from the integrated operation of Edison's control area. This savings inures to the benefit of all Edison's customers, including Cities. Cities will reveive their pro rata share of the system energy benefit.[33] The proposed treatment of the energy benefit to Edison's system derived from operating a city's reserve capacity is thus reasonable under the IOA.

D. ISSUE VII — Procedures for Integration of City Capacity Resources

Issue VII involves the appropriate time limit or standard under which Edison must allow integration of a proposed city capacity resource with its system. We reverse the Judge regarding sections 8.1.2.3, 8.1.2.4 and 8.1.2.6. We adopt a modified form of staff's proposal to delete section 8.1.2.4 and revise sections 8.1.2.3 and 8.1.2.6.

Under section 8.1.2.4, a proposed city capacity resource must be "compatible with (i) resources planned to serve the Edison Control Area, (ii) the resource schedule, and (iii) other resource plans periodically submitted by either party to regional agencies and organizations." Thus Edison may determine that a city's resource is unacceptable by merely altering its resource plan or submitting other resource plans to unspecified "regional agencies and organizations." Section 8.1.2.3 states that integration of such a proposed city capacity resource shall not require Edison to defer a proposed capacity resource listed by Edison in the current resource schedule for which Edison has made substantial financial or other commitments towards construction, unless the parties

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otherwise agree. This provision should be read in conjunction with section 8.1.2.6, which states that the parties shall agree upon

the date when such city capacity resource shall first be included in the resource schedule for planning purposes.

We agree with Vernon that these provisions give Edison and undue amount of discretion. Moreover, even if Edison does not abuse its discretion, these provisions unreasonably place a city in an uncertain situation, *i.e.*, guessing whether and when Edison will permit integration. An example illustrates the potential problem. Edison is not obligated to integrate a city capacity resource when Edison's own proposed resource would be deferred as a result. Thus, section 8.1.2.3 would require a city to defer the resource even though Edison may have the flexibility to defer that project or a different project or to include in its plans additional megawatts of capacity that had been contemplated for a slightly later date. In short, the IOA would hold a city to a higher standard of planning than is normal industry practice. In normal practice, projects are constantly being added, subtracted, deferred, and accelerated, and the total capacity available at a given time is never precisely the capacity level that was previously planned.

The IOA does not allow for the fact that a city's involvement in a project may typically occur at a different stage of project development than Edison's involvement. Edison will usually be involved with a project from its conception. On the other hand, a city cannot feasibly add capacity in large increments and may invest in projects that are already underway. Since the IOA does not accommodate the difference in lead time inherent in the difference in the stage of project development, a city is at a disadvantage when an attempt is made to coordinate integration under the IOA with the commencement of a commercial operation of a generating facility. The result is that the IOA authorizes Edison to subordinate a completed city project to an Edison project that may still be in the early stages of development or which may be deferred or never completed.[35]

It is reasonable to maintain the "substantial commitment" standard of section 8.1.2.3, but with a modification. As proposed by staff, the IOA would provide a three-year notice for the integration of a city capacity resource if the resource is less than fifty percent of a city's peak load, and a five-year notice if the

capacity resource is greater than fifty percent of a city's load and one percent of Edison's system load. A city seeking to diversify its sources of capacity would generally make an impact on Edison's system of less than one percent of system load. Edison's capacity resource planning appears sufficiently flexible to accommodate such a *de minimis* fluctuation in Edison's system resources, especially in light of a proposed three-year notice for the integration of a city capacity resource. Indeed, currently Edison requires a three-year notice of termination for its full requirements customers.[36] Thus, if any of these customers turn to alternative sources, Edison apparently believes that such a notice is sufficient for its planning purposes. Consequently, under these circumstances staff's proposed three-year notice requirement for partial requirements customers who intend to acquire and integrate a capacity resource[37] is reasonable. However, we find that the record does not support staff's further proposal that under certain load conditions a more protective five-year notice provision is appropriate.

E. ISSUE XIII — Peaking and Intermediate Capacity

The issue presented is whether the IOA should be revised to specifically address a city's peaking and/or intermediate resources and, if so, what the revision should be.

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On exceptions, Vernon and Edison claim that the instant problem is not moot, as stated by the Judge. However, both Vernon and Edison endorse the concept of voluntary negotiations ragarding this problem. Furthermore, Vernon, Cities and Edison note that this issue is before the Commission in Docket No. ER84-75-000, and can be pursued in that proceeding.

Edison has presented three possible approaches to revising the IOA to cover a city's peaking and intermediate generating facilties.[40]

As one option, a city may wish to acquire a peaking or intermediate facility which it dispatches itself on its side of the meter, after giving Edison adequate notice of the acquisition. The

record shows that Edison has an arrangement with Vernon for operation of its diesel generating units on Vernon's side of the meter.[41]

As a second option, a city may wish to integrate a peaking or intermediate facility under the current IOA provisions. Edison notes that this may be economically vaiable for a peaking facility with low energy costs, such as a hydropower peaking resource. A city would receive a capacity credit against its TOU-R demand charge and receive the value of low cost energy generated by its facility as an offset against TOU-R energy charges.

As a third option, a city would receive capacity credit for a peaking facility, but its exposure to purchasing contract energy would be limited. A city would only be obligated to pay incremental energy costs when its peaking unit was unavailable or unscheduled during designated and agreed upon peak hours, and then only when a city load is above its base load capacity credit line and exceeds the rate of delivery of a city's billing demand.

Overall, Edison states that Vernon is taking the unfair position that a city should be able to integrate and receive capacity credit for intermediate and peaking facilities

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without regard to whether such facilities would be useful and needed in Edison's control area. Edison claims that its offer to voluntarily negotiate along the lines of its three proffered proposals provides a reasonable vehicle for resolution of this issue.

Edison submits that the Commission should correct the Judge by noting that the problem is not moot in the instant proceeding. Vernon indicates that a combination of adopting its recommendations under Issue IV and voluntary negotiations between the parties is appropriate. Edison and Cities appear to prefer that the issue be pursued in other dockets.

* * *

We reverse the Judge's ruling that his holding on Issues II and IV disposes of the issue here and that the issue is moot. We find that this record does not present the substantial evidence neces-

sary to modify the existing IOA to specifically address the acquisition and operation of a city's peaking and intermediate resource. We note, however, that it appears that the parties are pursuing Issue XIII through other Commission proceedings.[43]

The Commission orders:

(A) The Initial Decision issued in Docket No. ER81-177-002 (Phase II) on May 18, 1984 is hereby affirmed and adopted except to the extent modified or reversed herein. Exceptions to the Initial Decision not granted in this Opinion are hereby denied.

(B) Within 45 days following the date of issuance of this order, Edison shall file any necessary amendments to the subject IOAs with Cities in accordance with the findings and conclusions of this decision and with the Commission's regulations. In the event a request for rehearing is pending at the close of the 45-day period, however, the aforementioned filing shall be made no later than 30 days from the date the request for rehearing is disposed of.

(C) Subdocket 002 of Docket No. ER81-177 is hereby terminated. A new subdocket will be assigned to the compliance filing ordered in Ordering Paragraph (B).

[Footnotes Omitted]

Re SCEcorp

Additional applicants: Southern California Edison Company; San Diego Gas and Electric Company

Decision 91-05-028
Application 88-12-035

California Public Utilities Commission
May 8, 1991

ORDER disapproving a proposed merger between Southern California Edison Company and San Diego and Electric Company.

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2. *The Commission's Review*

Early in this proceeding, applicants contended that the proposed merger's impact on transmission access and competition in bulk power sales markets were within the exclusive jurisdiction of FERC. We reject this contention for reasons articulated twenty years ago. *Northern California Power Agency v. Public Util. Com.* 5 Cal.3d 370 (1971), delcared:

> It is no longer open to serious question that in reaching a decision to grant or deny a certificate of public convenience and necessity, the commission should consider the anti-trust implications of the matter before it. The Commission itself has stated: 'There can be no doubt that competition is a relevant factor in weighing the public interest' . . .
>
> Although the commission is not bound by the dictates of the antitrust laws, it is clear that antitrust concepts are intimately involved in a determination of what action is in the public interest, and therefore the commission is obligated to weigh antitrust policy, [citations omitted.] . . . This is not to suggest, however, that regulatory agencies have jurisdiction to determine violations of antitrust laws. [citations omitted] Nor ar the agencies strictly bound by the dictates of these laws, for they can and do approve actions which violate

antitrust policies where other economic, social, or political considerations are found to be of overriding importance. In short, the antitrust laws are merely another tool which a regulatory agency employs to a greater or lesser degree to give 'understandable content to the broad statutory concept of the public interest.' [citations omitted]

* * *

It is true that sections 4, 9, 15, and 15a of Title 15 of the United States Code give the federal courts exclusive jurisdiction over antitrust actions brought by the federal government and over certain private suits under the federal antitrust laws. However, those sections clearly do not foreclose the Commission from consideration of antitrust matters. . . . (5 Cal.3d 377-378.)

* * *

As applicants note at OB, p. VI-27, we have used federal precedents in the past, and do so in this decision, due to the well-developed body of available federal antitrust authority.[23] However, our decision making authority over this merger, and its broad public interest aspects, is not so limited that it must be premised on whether the acquisition violates federal antitrust statutes.

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We now review the historical examples addressed by the parties.[33]

First, the evidence of Edison's abuse of Interruptible Transmission Service (ITS) curtailment, provided by Edison's former Energy Control Center Senior Operations Supervisor McCann, is not rebutted effectively by applicants. Applicants' argument, that Resale Cities benefit as Edison customers whenever Edison curtails in order to take cost-effective firm or economy energy, misses the point. Even if true, this justification ignores the economic harm to Resale Cities, as retail competitors of Edison, caused by the abuse of ITS curtailment procedures (McCann,

Exh. 44,100, pp. 24-30). It is precisely this type of competitive harm, rooted in the competition between Edison and the Resale Cities to obtain least cost resources to meet their retail customers' needs, which must be assessed in the review of this merger's vertical impacts.

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In connection with claimed line-loading problems which arguably prevented Nevada Power from selling power to Vernon (Attorney General's Opinion, p. 30), the effect of Edison's actions was to shift a portion of the loop flow burden to NPC while also precluding Vernon's purchase from NPC.

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In connection with Edison's refusal to schedule nonfirm transmission more than an hour in advance, it appears that Edison has the ability to supply nonfirm transmission to the Resale Cities on a prescheduled basis and that there is no operational impediment in issue. Edison would retain the ability to interrupt prescheduled ITS to the same extent and on the same terms as interruptible transmission provided on an hour-by-hour basis. The problem is a refusal to provide for prescheduling by contract or otherwise. Without the ability to preschedule, the Resale Cities cannot compete meaningfully with Edison for nonfirm purchases.

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The real question is whether Edison has merely played "hard ball" with the Resale Cities in the interests of its native load customers, or whether at times it has crossed this line and has used its transmission dominance to undercut the cities' efforts to lower costs to their retail customers. Based on the historical evidence, it is reasonable to conclude the latter. In sum, these

historical examples demonstrate that Edison has used its strategic control over transmission to the competitive disadvantage of other utilities, who are buyers and sellers in the relevant interregional transmission markets and in the network transmission market. The then Attorney General is correct that it is reasonable to infer that the merged utility, dominated by Edison, will continue Edison's past transmission access policies, unless effective mitigation measures are imposed.

* * *

A second issue bearing upon present circumstances is the already heavily concentrated state of transmission markets, as noted by DRA and the then Attorney General. The latter's expert testified that the majority of available capacity from the SW during 1993 to 2000 is controlled by Edison. He asserts that this control, combined with Edison's transmission access policies, has effectively forced other utilities to attempt to build new transmission lines not otherwise needed. The testimony that Edison engineered the LADWP swap to remove LADWP as a participant in the Mead-Adelanto project, in order to prevent or hamper construction of that line (Mays, RT 5126-30), is undisputed. This is also disturbing because Mead-Adelanto is one of the planned lines upon which Edison relies in countering adverse testimony concerning its transmission access policies.

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Element No. 4, feasibility of access, raises issues discussed previously in connection with native load customer demands. We do not contemplate a requirement that applicants share an essential facility if such sharing would be infeasible or otherwise would inhibit their ability to serve customers adequately. It is true that pro-competitive access to transmission lines must be tempered by native load requirements. However, the record is undisputed that, notwithstanding the demands and needs of native load customers and the obligation to serve, the merger partners have historically provided transmission access to others for purposes not related to native load needs. Network facilities are built to serve Edison's

entire service area load, including the load of the Resale Cities. And, import transmission lines are built with a view to the needs of total load area requirements, including those of the Resale Cities. These determinations are consistent with previous findings on the merger's competitive impacts in the defined transmission markets.

The fact that ratepayers may ultimately benefit from this redistribution of wealth if the price of SW nonfirm bulk power is depressed is not a justification for ignoring the competitive injury to the SW shot-term bulk power markets associated with the exercise of buyer market power. Ratepayers may be short-term winners, but will be long-term losers if there are adverse long-term efficiency consequences of the merged company's exercise of buyer market power in this market. Therefore, it would be shortsighted to ignore or minimize the consequences of the exercise of buyer market power just because it may favorably impact California ratepayers in the near term.

Findings of Fact

100. the effect of Edison's actions in connection with the claimed line-loading problems preventing Nevada Power from selling power to Vernon, was to shift a portion of the loop flow burden to NPC, while also precluding Vernon's purchase from NPC.

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102. Edison has the ability to supply nonfirm transmission to the Resale Cities on a pre-scheduled basis, and there is no operational impediment issue which would support Edison's refusal to schedule nonfirm transmission more than one hour in advance; Edison would retain the ability to interrupt pre-scheduled ITS to the same extent and on the same terms as interruptible transmission provided on an hour-by-hour basis.

103. Without the ability to pre-schedule, the Resale Cities cannot meaningfully compete with Edison for nonfirm purchases.

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105. The above-noted historical examples demonstrate that Edison has used its strategic control over transmission to the competitive disadvantage of other utilities, who are buyers and sellers in the relevant interregional transmission markets, and who are located in the network transmission market.

106. Applicants do not dispute the fact that Southern Cities have borne a proportionate share of the Pacific Intertic costs, as well as the cost of Edison's transmission facilities in general, through their wholesale and fully-allocated transmission rates.

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109. Edison controls the majfority of available [transmission] capacity from the SW during 1993 to 2000, and this control plus Edison's transmission access policies have effectively forced other utilities to explore the construction of new transmission lines that might not otherwise be needed.

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117. Several new transmission lines currently under study will not be constructed in sufficient time to constitute effective ease of entry under § 3.3 of the Merger Guidelines; Edison is making no effort to construct DPV2 prior to 1997, and seveal other lines are either on hold or in the study phase (Mead-Phoenix, Mead-Adelanto, and Utah-Nevada).

118. In the case of the Mead-Phoenix, Mead-Adelanto, and Utah-Nevada proposed transmission lines, LADWP's role is crucial to the participation of the Resale Cities, and its absence may adversely affect the viability of these projects from the

prospective of the Resale Cities, thus vitiating an ease of entry determination under § 3.3 of the Merger Guidelines.

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130. Notwithstanding the demands and needs of native load customers, and the obligation to serve, the merger partners have provided transmission access to others for purposes not related to native load needs.

131. Network facilities are built to serve Edison's entire service area load, including the Resale Cities' load, and import transmission lines are built with a view to the needs of total load area requirements, including those of Resale Cities. These determinations are consistent with previous findings on the merger's competitive impacts on the defined transmission markets.

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133. Given the geographic impediments associated with the Cajon and San Gorgonio Passes, the relevant transmission lines between California and the SW are nonduplicable. Furthermore, the physical constraints noted by intervenors in connection with the L.A. [Edison] Basin and service area facilities also indicate that these lines are nonduplicable.

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MOTION FILED
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No. 92-122

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CITY OF VERNON,

Petitioner,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For the Ninth Circuit

MOTION FOR LEAVE TO FILE AMICI BRIEF AND JOINT BRIEF OF AMICI CURIAE AMERICAN PUBLIC POWER ASSOCIATION AND NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION IN SUPPORT OF CITY OF VERNON'S PETITION FOR WRIT OF CERTIORARI

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JOINT MOTION OF AMERICAN PUBLIC POWER ASSOCIATION AND NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI OF THE CITY OF VERNON

The American Public Power Association ("APPA") and the National Rural Electric Cooperative Association ("NRECA") jointly move pursuant to Rule 37 of the Revised Rules of the Supreme Court of the United States for permission to file the attached amici brief in support of the petition for a writ of certiorari filed by the City of Vernon on July 20, 1992. This motion is necessary because Southern Cal-

ifornia Edison Company has refused to consent to the filing of the joint amici brief. City of Vernon has consented to filing of the joint amici brief. In support of their joint motion, APPA and NRECA show the following:

1. APPA is the national service organization representing more than 1,750 locally controlled public power systems throughout the United States. Collectively these systems constitute 15 percent of the electric utility industry in terms of customers served, providing electric service to more than 35 million customers. Some public power systems are vertically integrated utilities, owning generation, transmission and distribution facilities. Many more, however, own no transmission and are dependent on other utilities to provide transmission services. Such utilities are frequently referred to as transmission dependent utilities ("TDUs"). In most cases, the transmission facilities are owned by an investor owned utility ("IOU"). Further, that IOU is quite likely to be the public power system's electricity supplier as well as its direct retail competitor.

2. NRECA is the national organization of approximately 1,000 rural electric systems in 46 states, most of which are cooperatives. NRECA's members include local distribution cooperatives, which sell electric power to retail consumer-owners who are members of the cooperative, and generation and transmission cooperatives ("G&Ts") formed by distribution cooperatives to meet their power supply needs.

NRECA members provide central station service to some 25 million consumers-owners in more than 2,600 of the nation's 3,141 counties. Of these rural electric

systems, 62 are G&Ts, which are owned by, and serve 771 of the more than 900 rural electric distribution systems. G&Ts provide bulk power through generation and wholesale power purchases to their member-owner distribution cooperatives.

Generally, most distribution cooperatives are TDUs, in that they rely on the bulk power system of their wholesale supplier(s) for energy supply. Most are members of G&Ts, and many G&Ts also rely on other utilities' transmission for access to generation and purchased power.

3. The decision of the Ninth Circuit in *City of Vernon v. Southern California Edison Co.*, 955 F.2d 1361 (1992), greatly restricts the usefulness of the antitrust laws as a vehicle for obtaining access to the transmission facilities which are bottlenecks between the APPA and NRECA members and competing wholesale power suppliers. Without such access, the members have little resource other than to purchase their electricity requirements from their competitor that controls transmission access.

4. This Court stated in *Otter Tail v. United States*, 410 U.S. 366, 375 (1973), that Congress has not authorized the Federal Energy Regulatory Commission to compel a transmission dominant utility to provide transmission service. Rather, in large measure, Congress left provision of transmission service to the voluntary business judgment of the utilities. Such business judgment is subject to the requirements of the antitrust laws. The APPA and NRECA are gravely concerned with any decisions which weaken the ability of their members to rely upon the antitrust laws to pry open markets to competition.

5. The Ninth Circuit's decision is of concern not only to the many APPA and NRECA members located in the Ninth Circuit but also to their nationwide membership which will be affected if other courts follow the Ninth Circuit's lead in limiting this Court's *Otter Tail* decision. The problems presented by the Ninth Circuit's decision to the continuing efforts to achieve a more efficient industry through increased competition are nationwide in scope. APPA and NRECA are uniquely situated to address these important issues from a nationwide perspective of transmission dependent utilities.

WHEREFORE, APPA and NRECA request permission to file the attached amici brief in support of the petition for a writ of certiorari of the City of Vernon.

Respectfully submitted,

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JOINT BRIEF OF AMICI CURIAE AMERICAN PUBLIC POWER ASSOCIATION AND NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION IN SUPPORT OF CITY OF VERNON'S PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

The American Public Power Association ("APPA") and the National Rural Electric Cooperative Association ("NRECA") jointly submit this amici curiae brief in support of the petition for a writ of certiorari of the City of Vernon, California ("Vernon"), to the United States Court of Appeals for the Ninth Circuit with respect to its opinion in *City of Vernon v. South-*

ern California Edison Company, 955 F.2d 1361 (1992) (Appendix at 1).[1]

STATEMENT OF INTEREST

APPA is the national service organization representing more than 1,750 locally controlled public power systems throughout the United States. Collectively these systems constitute 15 percent of the electric utility industry in terms of customers served, providing electric service to more than 35 million customers. Some public power systems are vertically integrated utilities, owning generation, transmission and distribution facilities. Many more, however, own no transmission and are dependent on other utilities to provide transmission services. Such utilities are frequently referred to as transmission dependent utilities ("TDUs"). In most cases, the transmission facilities are owned by an investor owned utility ("IOU"). Further, that IOU is quite likely to be the public power system's electricity supplier as well as its direct retail competitor.

NRECA is the national organization of approximately 1,000 rural electric systems in 46 states, most of which are cooperatives. NRECA's members include local distribution cooperatives, which sell electric power to retail consumer-owners who are members of the cooperative, and generation and transmission cooperatives ("G&Ts") formed by distribution cooperatives to meet their power supply needs.

NRECA members provide central station service to some 25 million consumers-owners in more than 2,600

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[1] "Appendix" or "App." refers to the Appendix to the Petition for Writ of Certiorari of Vernon.

of the nation's 3,141 counties. Of these rural electric systems, 62 are G&Ts, which are owned by, and serve 771 of the more than 900 rural electric distribution systems. G&Ts provide bulk power through generation and wholesale power purchases to their member-owner distribution cooperatives.

Generally, most distribution cooperatives are TDUs, in that they rely on the bulk power system of their wholesale supplier(s) for energy supply. Most are members of G&Ts, and many G&Ts also rely on other utilities' transmission for access to generation and purchased power.

In order to be competitive in the retail market, TDUs generally must have transmission access to reach alternative bulk power suppliers in a competitive generation market.[2] The Federal Energy Regulatory Commission ("FERC") has recognized the importance of retail competition in the context of expressing concern that monopoly power at the wholesale level not be used to enhance or maintain an integrated utility's retail market position. The FERC has found that increased competition for franchises to provide retail electric service can be a positive force to encourage better service at lower rates. Increasing the cost of wholesale electricity to existing distribution systems (such as by denying them the access to lower cost wholesale competitors) dissuades

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[2] Regulation of Electricity for Resale and Transmission Service, FERC Docket No. RM85-17 (Phase I, NOI, May 30, 1985), FERC Stat. and Reg. ¶ 35,518 ("the availability of transmission service is a necessary element of competitive electricity markets").

others from entering the market as distribution systems.[3]

The decision of the Ninth Circuit is antithetical to an emerging competitive wholesale bulk power market and growing recognition of the importance of transmission access for that market to fully develop. The National Energy Strategy Report stresses the importance of transmission access "to increase economic efficiency" and "competition in wholesale markets" to "ensure that the Nation's industries, shops, and residences have access to electricity at the lowest reasonable cost."[4] The 1991 Economic Report of the President and the Annual Report of the Council of Economic Advisers states that "[s]teps should be taken to ensure that access to high-voltage transmission network is not controlled in a manner that restricts competition."[5] The United States Department of Energy concluded that greater access to transmission facilities would increase competition in wholesale markets and help ensure that the Nation's retail customers receive reliable electricity at the lowest reasonable cost.[6] The Office of Technology Assessment also supports expanded transmission access to increase competition.[7]

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[3] *Florida Power & Light*, 8 FERC ¶ 61,121 (1979), rehrg. denied, 9 FERC ¶ 61,015 (1979).

[4] National Energy Strategy, First Edition, 1991/1992 at 35.

[5] 1991 Economic Report of the President at 107.

[6] United States Department of Energy, April 1991, Response to Questions of Congressman Edward Markey.

[7] Electric Power Wheeling and Dealing: Technological Considerations for Increasing Competition, OTA Report, 1989, at 6.

TDUs have, in the past, relied upon this Court's decision applying the Sherman Act in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), and other precedents to force monopolistic integrated electric utilities controlling essential transmission facilities to provide the transmission access necessary to reach competing wholesale suppliers. The threat of such antitrust lawsuits has had a slow but salutary effect in expanding transmission access and increasing competition.[8]

The decision of the Ninth Circuit in *City of Vernon v. Southern California Edison Co.*, dramatically undercuts *Otter Tail* and other decisions of this Court and other decisions of Circuit Courts of Appeal, by providing a ready defense to any attempt by a TDU to obtain transmission access. It does so at the very time the national interest requires that the electric utility industry have available all appropriate generating options so that the most efficient mix of plants for satisfying the demand for electricity at reasonable costs can be built.[9] As the FERC report indicates, for the wholesale electricity market to be competitive and robust, all utilities, including TDUs, must be able to obtain long-term firm transmission service.[10] Without access to the essential transmission facilities, TDUs will be excluded from the competitive wholesale power markets. While municipal and cooperative utilities are potentially constructive forces for both the supply and demand sides of the bulk (wholesale) power

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[8] FERC 1989 Transmission Task Force Report at 175.

[9] Id. at 165.

[10] Id. at 171.

market,[11] they cannot perform this role if their current monopoly suppliers can exclude them from the market with impunity.

Since the FERC has little meaningful power to compel IOUs to provide transmission service,[12] the only recourse available to TDUs to force their monopoly supplier to allow competition in the wholesale market, is enforcement of the antitrust laws. Accordingly, the members of APPA and NRECA will be seriously and adversely impacted by the Ninth Circuit's decision at issue herein.

SUMMARY OF ARGUMENT

A vertically integrated electric utility is legally precluded from using its monopoly power over essential transmission resources to preserve its monopoly in the wholesale and retail electricity markets. Although a monopolist in many instances does not have a duty to deal with a competitor, a monopolist may not refuse to deal if the refusal is for the purpose of maintaining a monopoly or if the monopolist controls an essential facility like transmission lines.[13] Since Edison has conceded (Pet. at 3) that it has monopoly power in relevant markets, that its transmission lines are essential facilities, and that it competes with Vernon, Edison has a duty to deal under both prongs of the rule.

If a monopolist refuses to deal in the face of an antitrust duty to deal, it has a "heavy burden of

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[11] Id.

[12] *Otter Tail, supra*, 410 U.S. at 375.

[13] Von Kalinowski, *Antitrust Laws and Trade Regulation* §36C.02[3] (Matthew Bender).

establishing an affirmative defense which competitively justifies [its] apparent deviation from the operations of a free market." *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 113 (1984). To meet that burden, a monopolist must show that the procompetitive effects of its refusal to deal outweigh the anticompetitive effects. *Eastman Kodak Co. v. Image Technical Serv., Inc.*, ___ U.S. ___, 60 USLW 4465, 4475 (1992). Edison has failed to assert any efficiency justification for its refusal to deal. Even if it were assumed that the avoidance of a *de minimis* temporary price increase is procompetitive, the Ninth Circuit erred in failing to weigh it against the long-term anticompetitive effects.

The Ninth Circuit failed to apply *Otter Tail* by requiring both a refusal to provide transmission service and a refusal to sell wholesale power before *Otter Tail* is applicable. The affirmative defense permitted by the Ninth Circuit puts its decision at odds with the decisions of most other Circuits, thus creating an inconsistent application of the law among Circuits.

Throughout its decision, the Ninth Circuit ignored the national policy favoring the maximum possible competition in the industry. Rather, the Ninth Circuit has ruled that national policy must give way to the monopolist's desire to preserve its monopoly.

ARGUMENT

THE NINTH CIRCUIT'S HOLDING THAT A MONOPOLIST CAN EXCLUDE ITS COMPETITOR FROM THE INPUT MARKET BECAUSE THE MONOPOLIST BELIEVES THAT INCREASED COMPETITION WILL HARM ITS CUSTOMERS IS CONTRARY TO THE OPINIONS OF THIS COURT, TO THE OPINIONS OF OTHER CIRCUITS, AND TO THE NATIONAL POLICY IN FAVOR OF COMPETITION

A. The Ninth Circuit's Decision Conflicts With Decisions Of This Court.

The decision of the Ninth Circuit permits a vertically integrated electric utility with monopoly power in relevant markets to refuse to transmit power for a competitor because the monopolist in effect claimed that providing transmission service would have a temporary *de minimis* effect on the rates it charges its retail customers. In short, the Ninth Circuit's opinion permits the monopolist to restrain competition because, in the monopolist's opinion, competition does not work in the electric utility industry. This Court has long rejected defenses based on the argument that competition is not workable in a particular industry.[14] *National Society of Professional Engineers v. United States*, 435 U.S. 679, 689 (1978) ("The early cases also foreclose the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition. That kind of argument is properly addressed to congress . . .". (citations omitted)). This Court has specifically rejected the no-

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[14] Von Kalinowski, *Antitrust Laws and Trade Regulation* §9.03[3] (Matthew Bender).

tion that the antitrust laws do not apply to electric utilities. *Otter Tail, supra,* 410 U.S. at 365.

The decision below is additionally based on the finding that the defendant, Southern California Edison Company ("Edison") was fully using its transmission lines and would have to cease its own use to provide transmission service to the plaintiff, City of Vernon.[15] As Vernon states (Pet. at 3, n. 2), the only record evidence that Edison was fully utilizing its lines was the statement of one Edison employee that Edison's lines were always fully utilized even if they were carrying no power unless the lines were out of service and disconnected. Thus, Edison's full use did not mean the lines were fully loaded.

Edison's unique definition of full utilization, which was accepted by the Ninth Circuit, would permit any utility to deny access to its transmission lines because they were fully utilized, *i.e.*, the lines were not disconnected.[16] For example, the transmission lines at issue in *Otter Tail* were connected and in service; therefore, according to the Ninth Circuit, fully utilized regardless of the fact that the lines were not fully loaded. Under the Ninth Circuit's reasoning, *Otter Tail* would have been decided the other way.

The decision of the Ninth Circuit is one of two recent decisions which reveal that some Circuit Courts no longer feel constrained to follow *Otter Tail.* In

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[15] App. at 10.

[16] Prior decisions by this Court and the Ninth Circuit have held that transmission lines are not fully utilized unless they are fully loaded. *FPC v. Idaho Power Co.*, 344 U.S. 17 (1962); *Idaho Power Co. v. Federal Power Commission*, 346 F.2d 956 (9th Cir. 1965), cert. denied, 382 U.S. 957 (1965).

City of Chanute v. Williams Natural Gas Co., 955 F.2d 641 (10th Cir. 1992), *cert. petition pending*, No. 91-2066, Oct. Term, 1991, the Tenth Circuit held that a monopolist in control of an essential gas pipeline can lawfully deny access to the pipeline to preserve its own profits. Moreover, the court held that so long as the pipeline was ready and willing to sell its own natural gas to the municipal distributors, there was no denial of access. Thus, the Tenth Circuit held that there was no violation of the antitrust laws despite the restraint of wholesale competition because the municipal distributors could always buy from the monopolist pipeline.

The Ninth Circuit also misreads *Otter Tail* to apparently determine that that precedent is not applicable unless there is a refusal to sell wholesale power as well as a refusal to provide transmission service.[17] However, in *Otter Tail*, this Court affirmed a district court decree which required Otter Tail to both sell at wholesale and to provide transmission service.[18] If selling wholesale power discharges the duty to deal as the Ninth and Tenth Circuits believe, there would have been no reason to require Otter Tail Power Company to also offer transmission service.

Development of a coherent national transmission and competition policy for the electric utility industry will be impeded, if not made impossible, if *Otter Tail* is only good law in the east and midwest but is of no effect in the western third of the nation, as a result of a conflict among the Circuits.

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[17] App. at 11.

[18] 410 U.S. at 368-69.

B. The Circuits Are Split In Enforcing A Monopolist's Duty To Deal.

As described above, if allowed to stand by this Court, the Ninth Circuit's decision would have the effect of gutting *Otter Tail*, at least in that Circuit. At the same time, other Circuits appropriately recognize a monopolist's duty to deal, especially when an essential facility is controlled by the monopolist.[19] The Second Circuit's decision in *Delaware & Hudson Ry Co. v. Consolidated Rail Corp.*, 902 F.2d 174 (2d Cir. 1990), *cert. denied*, ___ U.S. ___, 114 L.Ed.2d 125 (1991), properly applied the essential facility doctrine in holding that an unreasonable restriction of access need not be a total restriction—it is sufficient if the terms of the offer to deal are unreasonable. Further, the monopolist's refusal to deal could not be legally justified on the asserted ground that the conduct provided the monopolist with short term profits.

Certiorari should be granted to resolve the growing split of authority among the Circuits regarding the duty of a monopolist in control of an essential facility to deal with its competitors.

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[19] *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986); *MCI Communications v. American T&T Co.*, 708 F.2d 1081 (7th Cir. 1983); *Gamco Inc. v. Providence Fruit & Produce Bld., Inc.*, 194 F.2d 484 (1st Cir. 1952), *cert. denied*, 344 U.S. 817 (1952); *Byars v. Bluff City News*, 609 F.2d 843 (6th Cir. 1980); *TV Signal Co. v. AT&T*, 617 F.2d 1302 (8th Cir. 1980); *Woods Exploration & Prod. Co. v. Aluminum Co. of Am.*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

C. The Ninth Circuit Has Recognized A New Business Justification Defense That Is Inconsistent With This Court's Decisions.

The Ninth Circuit held that Edison had a legitimate business justification defense to a section 2 claim for denial of access to an essential facility. Edison's defense was based upon a number of assumptions: *if* Edison granted Vernon transmission access to competing wholesale suppliers, and *if* Edison did not respond to competition by operating more efficiently, and *if* as a result of competition to purchase wholesale power Edison's costs increased,[20] and *if* Vernon's purchases of power from others reduced Vernon's subsidy of Edison retail service, and *if* Edison filed and was allowed to collect increased retail rates, its retail customers would face a *de minimis* temporary increase in rates. Edison failed to show that any of these speculative assumptions were satisfied. Edison did not argue that it was able to operate with greater efficiency if it refused to deal with Vernon. The foreclosure of competition to maintain monopoly power is a violation of section 2 of the Sherman Act. *Eastman Kodak Co. v. Image Technical Service, Inc.*, ___ U.S. ___, 60 USLW 4465 (1992). Liability in such

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[20] The California Public Utilities Commission has found after full hearing that Edison's control over transmission permits it to exercise monopsony power to depress prices in the wholesale bulk power market. *In the Matter of the Application of SCEcorp and its public utility subsidiary Southern California Edison Company and San Diego Gas & Electric Company for Authority to Merge San Diego Gas & Electric Company into Southern California Edison Company*, 122 PUR4th 225, 266, 314 (finding of fact no. 180) (1991). To the extent granting transmission access reduced Edison's monopsony power, prices in a competitive wholesale/bulk power market might increase.

cases depends upon whether there is a valid business reason for the foreclosure. Valid business reasons exist only if there are legitimate competitive reasons for the refusal. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), cited at note 32 in *Eastman Kodak Co., supra.* Edison failed to offer any procompetitive justification for its refusal to deal. Despite the lack of any efficiency or procompetitive reason for the refusal to deal the Ninth Circuit held that Edison had a valid business justification based on the claimed adverse effect on its customers.[21]

Edison's position was that in order to avoid a temporary *de minimis* rate increase to its retail customers, it had to be allowed to wield its transmission monopoly to maintain its wholesale and retail monopolies. The Ninth Circuit agreed. Contrary to the Ninth Circuit, the use of monopoly power in one market to maintain monopoly power in another market is an antitrust violation. *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927). The rule of *Lorain Journal* and *Southern Photo* is not abrogated because the monopolist might avoid a temporary *de minimis* price increase by maintaining its monopoly.

It has long been the law that it is no defense to an antitrust violation that the violation may temporarily or even permanently reduce prices. *Fashion Originators' Guild of America v. FTC*, 114 F.2d 80 (2d Cir. 1940), *aff'd*, 312 U.S. 457, 467 (1941); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982). Accordingly, the avoidance of a temporary, *de minimis* price increase is not a defense. In

[21] App. at 10.

City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978), this Court rejected the argument that a municipality should be exempt from the antitrust laws because it was motivated by the well-being of its citizen-customers rather than private profit. *A fortiori*, a private corporation, like Edison, should not be able to defend an antitrust violation by arguing that it is motivated by the well-being of its customers in protecting them from the harmful side effects of competition.[22] This is particularly the case where the effects are short-term and *de minimis*.

D. National Policy Favors More, Not Less, Competition in the Electric Utility Industry.

Vernon, in its petition for certiorari, has demonstrated that Congress has expressed national public policy in fostering the maximum attainable competition in the electric utility industry.[23] Scholarly literature has confirmed the benefits of competition in the

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[22] Vernon submitted evidence that Edison's claimed concern for its retail ratepayers was pretextual. See Pet. at 9-10 and note 26.

[23] Pet. at 23-25.

industry[24] as has the FERC.[25] Access to transmission service is essential to effective competition in the electricity markets.[26] It is notable that one third of all power sold at retail was previously sold at wholesale rather than self-generated.[27] In the future, the nation will have to rely upon non-traditional power suppliers to meet the need for additional generating resources.[28] In fact, in 1990 independent generators of electric energy built more new generation capacity than traditional electric utilities.[29] The lack of transmission access can be a barrier to entry into the competitive generation market and non-traditional generators will require transmission access to com-

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[24] Weiss, "Antitrust and the Electric Power Industry", 135, 170-171, in Promoting Competition in Regulated Markets (Almarin Philips ed., 1975); Meeks, "Concentration in the Electric Power Industry; The Impact of Antitrust Policy," 72 Colum. L. Rev., 64, 120, 125 (1972); R. Hellman, Government Competition in the Electric Utility Industry, A Theoretical and Empirical Study 228 (1972); W. Shepard & C. Wilcox, Public Policies Towards Business 415 (6th ed. 1979) (effective competition in bulk power market is technologically feasible and would produce significantly lower costs and better service); 2 A.E. Kahn, The Economics of Regulation: Principles and Institutions 104-06 (1970) (significant value of retail competition in electric utility markets).

[25] *Gulf States Utilities Co.*, 5 FERC ¶61,066 at 61,098 (1978).

[26] Regulation of Electricity for Resale and Transmission Service, FERC Docket No. RM85-17 (Phase I, NOI, May 30, 1985); Pierce, "A Proposal to Deregulate the Market for Bulk Power", 72 Va. L. Rev. 1183, 1215 (1986).

[27] FERC 1989 Transmission Task Force at 18.

[28] Id. at 67.

[29] 1990 Utility Data Institute.

pete for wholesale sales.[30] Non-traditional generators of electric energy that have won bids to provide power have been blocked from supplying that power due to a utilities' refusal to wheel power.[31] The President, the Department of Energy, FERC, the Council of Economic Advisers and Congress' Office of Technology Assessment, to name just a few, recognize the need for transmission access in order to elicit long term general efficiencies. See notes 4 to 7, *supra*. Both the industry and regulators have been studying methods of increasing transmission access, in order to elicit long term generation efficiencies.[32] At the very time that national policy makers and bodies are stressing the importance of increasing transmission access the Ninth Circuit has recognized a justification which readily permits integrated monopolists to deny necessary transmission access to their transmission dependent competitors.

Certiorari should be granted to ensure that the national policy in favor of competition is not thwarted to preserve a possible temporary, *de minimis* advantage to the monopolist's retail customers.

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[30] Id.

[31] Testimony of Larry W. Ellis, Virginia Electric & Power Company, before the State Corporation Commission of Virginia, Case No. PUE 8905 (1989).

[32] National Governor's Association 1987 report *Moving Power: Flexibility For the Future*; National Regulatory Research Institute 1987 reports: *Some Economic Principles for Pricing Wheeling Power*, and *Non-technical Impediments to Power Transfers*; the Office of Technology Assessment of the United States Congress *Electric Power Wheeling and Dealing: Technology Considerations for Increasing Competition* (May 1989).

CONCLUSION

The Ninth Circuit has misapplied *Otter Tail* and created new justifications for refusal to deal which permit a monopolist to use its power in one market to maintain its monopoly in another market. At a time when it is widely recognized that the assurance of an adequate and efficient electric utility industry requires greater competition, the Ninth Circuit's decision gives transmission dominant utilities the green light to foreclose the development of competition.

The requested writ of *certiorari* should be issued to provide the Court with the opportunity to restore the vigor of the antitrust laws and to enforce the national policy in favor of competition.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

CITY OF VERNON,
Petitioner,
v.
SOUTHERN CALIFORNIA EDISON COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Pursuant to Sup. Ct. R. 29.1, Respondent Southern California Edison Company states that it is a public utility, that its parent holding company is SCEcorp, and that it has no subsidiary companies (other than wholly-owned subsidiaries).

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

I.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals correctly conclude that a regulated electric utility was not liable under Section 2 of the Sherman Act for refusing to allow additional access to its transmission lines when the admitted effect of providing the demanded access would be a shift of benefits to the entity seeking access with a corresponding increase in costs to the utility's remaining customers?

2. Did the Court of Appeals correctly conclude that an antitrust plaintiff could not sustain an action for treble damages when its only proof of damages is fatally flawed because, *inter alia*, it failed to provide a means to segregate the losses, if any, caused by acts which were antitrust violations from those acts which were not antitrust violations?

II.

STATEMENT OF THE CASE

A. Introduction

Vernon's Petition For Writ of Certiorari does not raise any issue of extraordinary importance pertaining to antitrust law or the electric utility industry. As the Court of Appeals properly viewed it, this is a straight-forward case of an antitrust plaintiff who failed to provide any evidence sufficient to raise a triable issue as to two *essential elements* of its Section 2 claim for damages: (1) lack of any valid business justification for the conduct alleged to be unreasonable and anticompetitive; (2) proof of damages caused by antitrust violations.

Only through a distortion of the record[1] and the rulings of the courts below is Vernon able to see anything remarkable in this case. Viewed in the guiding light of the undisputed facts and well-established legal precedent, Vernon's antitrust case can be seen — as the courts below have seen it — for what it really is: a

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[1]The numerous misstatements of the record are treated more fully below. It should be noted at the outset, however, that Vernon's Petition For Writ of Certiorari ("Pet.") cites materials that were not even before the courts below in connection with their summary judgment rulings. Vernon, for instance, cites material that was not submitted until after the summary judgment rulings and in connection with Vernon's motion for reconsideration — which was denied by the District Court. (*See* Pet. at 4 n.5, to "O'Malley Decl.") The Court of Appeals affirmed the denial of that motion (Pet. App. at 7 n.7) and Vernon does not seek review of that ruling. Vernon also cites [and includes in its Appendix to Petition for Writ of Certiorari ("Pet. App.") at 73 *et seq.*] excerpts of a decision from an unrelated proceeding before the California Public Utilities Commission (CPUC). (*See* Pet. at 12 n.32 & n.33, 14 n.37, and 23 n.48.) Those excerpts were not before the courts below; and Vernon never even requested that the courts below give collateral estoppel effect to any rulings in the "CPUC Merger Case." Finally, Vernon refers to (Pet. at 5 n.5, 12 n.31) FERC rulings on the Integration Operations Agreements ("IOAs") offered to resale customers, even though the Court of Appeals remanded the case on the Vernon's IOA claim and the FERC rulings on the IOA have nothing to do with this petition.

factually unsupportable case grounded in fundamentally flawed legal theories and thus perfectly suited for summary judgment.

B. Vernon's Complaint And The Proceedings Leading To The Summary Judgment Rulings At Issue Here.

Vernon's complaint alleges that Edison has violated both Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1982), by engaging in a course of conduct commencing in 1961 and continuing to the present. Vernon's Section 2 "foreclosure damage" claim, the only claim at issue in Vernon's Petition For Writ Of Certiorari, alleges that Edison improperly restrained Vernon from purchasing bulk power from suppliers other than Edison by denying Vernon access to its transmission network.

On November 13, 1989, Edison filed a motion for summary judgment seeking dismissal of Vernon's foreclosure damage claims. CR 175.[2] At that time, all discovery in the case had been completed and the case was on the verge of trial. Vernon also filed, on November 13, 1989, two motions for partial summary judgment seeking a judicial determination that Edison's entire transmission network constituted an "essential facility," and that Vernon and Edison were engaged in "franchise competition." CR 183, 184. Vernon and Edison also filed several motions *in limine* at that time. With the consent of the parties, the District Court considered all of these motions and their accompanying evidentiary support in ruling on Edison's foreclosure damages summary judgment motion.

On March 1, 1990, the District Court granted Edison's motion for summary judgment on Vernon's Section 2 foreclosure damage

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[2]The citation "CR _____" is to the docket number assigned to the material in the Clerk's Record. The cited evidence is further identified as to its source on those occasions when it refers to an admission in response to a Request for Admission ("RFA") by Vernon or to a statement by Whitfield A. Russell, the author of Vernon's damage study.

claims. CR 263.[3] On August 30, 1990, the District Court filed its "Findings of Facts and Conclusions of Law in Support of its Order Granting Edison's Motion for Summary Judgment on Plaintiff's Foreclosure Claims" ("District Court Findings Of Fact"), Pet. App. at 25 *et seq.*[4] On *de novo* review, the Ninth Circuit Court of Appeals affirmed in all respects that are pertinent to Vernon's Petition For Writ Of Certiorari. *City of Vernon v. Southern California Edison Co.*, 955 F.2d 1361 (9th Cir. 1992) (Pet. App. at 1-23).

C. Statement Of Relevant Factual Background To Summary Judgment Rulings.

The District Court's decision granting summary judgment for Edison, and the Ninth Circuit's opinion affirming it, should be viewed against the following undisputed factual backdrop that was presented to those courts.[5]

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[3]The District Court further denied Vernon's motions premised on the essential facility doctrine and its claims of franchise competition. *Id.* The Court declined to rule on the various motions *in limine*.

[4]On September 17, 1990, Vernon filed a Motion for Reconsideration of the District Court's March 1 Order dismissing its foreclosure damage claims. CR 297. In support of that motion, Vernon submitted additional exhibits and once again sought to reargue its foreclosure damage claims. CR 298. The District Court denied this motion for reconsideration (CR 310) and the Court of Appeal affirmed that denial. Pet. App. at 7 n.7.

[5]This factual background is based primarily on the District Court's Findings Of Facts (Pet. App. at 25 *et seq.*). It also is based in part on the District Court's "Memorandum of Decision Granting Motion for Summary Judgment with Respect to [Vernon's] Rate Filing and Group Boycott Claims" (hereinafter "District Court Decision Re Rate Filing/Group Boycott Claims") [reported at *City of Vernon v. Southern California Edison Co.*, 1990-1 Trade Cases (CCH) ¶ 69,032 (C.D. Cal.), *aff'd* 955 F.2d 1361, 1371 (9th Cir. 1992)].

1. Overview Of Edison's Operations And The City Of Vernon.

Edison provides both retail and wholesale electric service in Central and Southern California within a certificated service territory approved by the California Public Utilities Commission ("CPUC"). Edison's retail rates and the terms of service to its retail customers are regulated by the CPUC.[6] Edison's wholesale (resale) rates, and any agreements between Edison and its wholesale (resale) customers, including Vernon, regarding wholesale service or transmission, must be filed with, and approved by, the FERC.[7] Edison cannot legally charge a rate or provide a service other than that specified in the filed tariff.[8]

The city of Vernon is a California municipality located within Edison's service territory that owns a distribution system through which it provides electricity to its industrial retail customers living within the city limits. Vernon shares common boundaries with Edison's service territory, as well as with the City of Los Angeles which maintains its own service territory through the Los Angeles Department of Water and Power ("LADWP").[9]

2. Edison's Transmission Network.

Edison's transmission lines are part of an interconnected network that links it with other utilities located throughout the Western United States. Since 1978, Edison has increasingly relied upon distant generating resources, and its electric interconnections with other systems, to acquire the power necessary to meet its total load requirements. Edison has devoted substantial effort to identifying and obtaining low-cost power resources to reduce its customers' overall costs of service. For example, in the early 1960's, Edison began its participation in an EHV (Extra High Voltage) transmission project linking Southern California with

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[6]District Court Findings of Fact, ¶ 2.15 (Pet. App. at 28). *See also* Cal. Pub. Util. C. §§ 451 *et seq.*, 726 *et seq.*

[7]*Id.*, ¶ 2.16 (Pet. App. at 29).

[8]*Id.*; *see, e.g.*, 16 U.S.C. §§ 824d, 824e.

[9]District Court Findings Of Fact at ¶ 2.7 (Pet. App. at 27).

the Pacific Northwest, known as the Pacific Intertie. The Intertie was designed to harness surplus power resources generated in one area to meet the needs of uses located in other regions.[10]

In addition to the Pacific Intertie, Edison has interests in EHV transmission lines extending to the Southwest United States. These facilities include lines extending from the Los Angeles Basin to Nevada, Arizona, and the "Four Corners" region of New Mexico. The remaining portion of Edison's transmission facilities consists of a network of 220- or 230-Kv transmission lines in the greater Los Angeles metropolitan area.[11] This transmission network connects with the lines of a number of other major utilities, including LADWP and the California Department of Water Resources ("CDWR").[12]

3. Vernon's Access To Edison's Transmission Lines.

Edison offers transmission service to its resale customers whenever it will not harm the economic interests of its customers or the reliability of its system.[13] Whenever Edison has had unused

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[10]District Court Findings Of Fact, ¶ 2.11, 2.12 (Pet. App. 28).

[11]Response to RFA No. 565, CR 177 at 560.

[12]District Court Findings of Fact, ¶ 2.14 (Pet. App. at 28).

[13]CR 200 at 86-88, 103; Response to RFA No. 733, CR 177 at 598. Pursuant to the 1972 settlement agreements between Edison and the Resale Cities, Edison and the Resale Cities have entered into "generic" Integrated Operations Agreements ("IOA's") and matrix agreements allowing them "to use Edison's EHV lines whenever excess unused capacity is available and when systems conditions permit the importation of this energy." *See* District Court Decision Re Rate Filing/Group Boycott Claim, *supra* [1990-1 Trade Cases (CCH) ¶ 69,032, at 63,663]. Those IOA's extend to City-owned resources (as well as purchased power) and provide that Edison will use its "best efforts" to provides EHV transmission service on its lines, and is obligated to provide network services even if that requires building new lines for integrated resources. Hence Vernon's characterization of the generic IOA's as providing "highly restricted access to its integrated network (but none on Edison's EHV lines)" (Pet. at 7) is incorrect.

capacity either on its 220-Kv network or on its EHV transmission lines, for example, it has made firm transmission service available to the resale Cities.[14] Indeed, throughout the entire period for which damages are claimed in this action, Edison has provided firm 220-Kv network transmission service when Vernon has requested it.[15] Edison also has provided firm transmission service over its EHV transmission lines for Vernon's entitlements in two generating facilities lying outside of the Southern California Basin, i.e., the Hoover Dam facility in Nevada and the Palo Verde Nuclear Generating Station in Arizona.[16] Vernon is thus incorrect in asserting (Pet. at 9) that "Edison has always refused to grant Vernon any firm access to its EHV lines to reach any of the bulk power markets in the southwest."

Edison also provides interruptible transmission service ("ITS") to its wholesale customers whenever it will not harm system reliability or have an adverse impact on its retail or native load customers.[17] Edison has offered its resale customers, including Vernon, ITS over its EHV lines, including the Intertie, since at least 1978.[18] Vernon has in fact economically used ITS provided by Edison in meeting its energy needs.[19]

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[14]CR 196 at 3-4, Issue Nos. 6 & 8; District Court Decision Re Rate Filing/Group Boycott Claims, [1990-91 Trade Cases (CCH) ¶ 69,032, at 63,662-3).

[15]*See, e.g.,* Response to RFA Nos. 731-33, CR 177 at 597-98.

[16]CR 200 at 43-44; CR 211 at 61, ¶ 4; CR 177 at 525-27; CR 184 at 127-29.

[17]CR 193 at 259-61; CR 200 at 86-88, *see also* District Court Decision Re Rate Filing/Group Boycott Claims [1990-91 Trade Cases (CCH) ¶ 63,032, at 63,663].

[18]Response to RFA Nos. 594, 597, CR 200 at 574, 576; *see also* District Court Decision Re Rate Filing/Group Boycott Claims [1990-91 Trade Cases (CCH) ¶ 63,032, at 63,663].

[19]District Court Findings Of Fact, ¶¶ 2.35-2.37, 2.42-2.46 (Pet. App. at 32-33); Response to RFA No. 726, CR 177 at 596. *See also* CR 200 at 49.

4. Vernon's Bulk Power Resources.

Edison has the responsibility to supply Vernon with all the power it needs at FERC approved prices. There is no claim that Edison has not met this responsibility. In addition, Vernon has used both interruptible and firm transmission service furnished by Edison to decrease substantially its dependence upon Edison for its power needs. As the district court found: "In 1983 Vernon bought nearly all of its electricity from Edison. By 1987, it was purchasing less than one-half of its requirements from Edison."[20] As of 1989, of its peak requirements, Vernon obtains over 92% of its capacity from non-Edison sources.[21] Vernon's suggestion of dependence on Edison (Pet. at 6-9) is belied by these undisputed facts.

D. Vernon's Section 2 "Foreclosure Damage" Claims.

Vernon's foreclosure damage claim alleges that Edison unlawfully restrained Vernon from purchasing bulk power from suppliers other than Edison by denying Vernon access to its transmission lines. Vernon contends that the antitrust laws require Edison to give Vernon additional transmission service over all of its EHV lines, including the Pacific Intertie and those lines extending to the Desert Southwest, as well as unconstrained and unlimited transmission service over Edison's 220-Kv network. Edison's failure to provide this comprehensive service, according to Vernon, forced Vernon to purchase wholesale power from Edison at prices higher than it would otherwise have had to pay.[22]

Vernon's damage study sets out the parameters of Vernon's foreclosure claims. Vernon calculates the damages resulting from Edison's allegedly illegal conduct as the difference between the rate Edison charged Vernon for power and that which Vernon contends it would have paid in the absence of any foreclosure.

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[20]District Court Findings Of Fact, ¶ 2.41 (Pet. App. at 33).

[21]District Court Findings Of Fact ¶¶ 2.42, 2.43, 2.46 (Pet. App. at 33).

[22]District Court Findings Of Fact ¶ 3.1 (Pet. App. at 34).

Vernon quantified these "overcharge" claims in a damage study, which pursuant to a procedural schedule established by the District Court, was "the final version of Vernon's damage study," and "the only one which could have been presented by Vernon at trial."[23] The fundamental assumption of this damage study is that Edison is obligated to provide Vernon with what it terms as "relative size share" firm access to Edison's high-voltage transmission lines as well as unconstrained access to its 220-Kv network.[24]

Vernon's claim (Pet. at 3-4 n.4) that Edison's network "has excess capacity" to supply transmission to Vernon and others is contrary to the access scenario in Vernon's own damage study which was predicated on the assumption that the line was fully utilized. Because this scenario was assumed by the parties, the District Court and the Court of Appeals as Vernon's "request" for transmission access, any claim of denial of access when there was "excess" capacity is outside the scope of the assumptions underlying the summary judgment motion.

E. The District Court Decision.

The District Court granted summary judgment on Vernon's foreclosure claims on several grounds. As to Vernon's claims that it was entitled to "relative size share" firm access to Edison's transmission lines, the District Court determined that Edison had established a legitimate business reason for its refusal to provide the requested access.[25]

At the outset, the District Court found, and Vernon does not dispute here, that "Vernon has never made a formal request to Edison for relative size share firm transmission access."[26] Nevertheless, the District Court addressed the merits of Vernon's

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[23]District Court Findings Of Fact 3.3 (Pet. App. at 34). This damage study was not, as Vernon suggests, "admitted into evidence."

[24]*Id.* at 3.6 (Pet. App. at 35).

[25]*Id.* at ¶¶ 7.1-7.5 (Pet. App. 42-43).

[26]*Id.* at 3.13 (Pet. App. 36).

claims on the assumption that if Vernon had demanded the access assumed in the damage study, the request would have been refused. The District Court also assumed, only for purposes of the summary judgment, that Edison had monopoly power and its transmission lines were essential facilities.[27] The District Court thus addressed whether given this assumption, Edison violated the antitrust laws by refusing to give Vernon all of the access to facilities that it demanded.

The District Court determined there was no genuine issue of material fact with respect to Edison's assertion of a legitimate business justification for refusing relative size share access because: "Vernon has conceded that if Edison granted Vernon the access it has demanded, the costs for Edison's other customers would increase. Even assuming competition exists between Edison and Vernon, Edison is not obligated by the antitrust laws to confer a benefit on Vernon at the expense of its own customers."[28] Despite Vernon's present expression of doubt as to whether retail rates would have increased (Pet. at 3 n.3), this was admitted below by Vernon.[29]

The District Court determined Vernon did not point to any facts in opposition that would create a material issue of fact as to Edison's legitimate justification. Although Vernon now contends that the courts below "disregarded Vernon's evidence" that the asserted business justification was "pretextual,"[30] the District Court determined,[31] as did the Ninth Circuit,[32] that *no* such

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[27]*Id.* at ¶¶ 5.4, 5.5 (Pet. App. 39). Vernon incorrectly states that Edison "conceded" its transmission network is an "essential facility." See Vernon's Brief at 3.

[28]*Id.* at ¶ 7.3 (Pet. App. at 42-43).

[29]*Id.*, at ¶¶ 3.18 (Pet. App. at 36-37), 7.3 (Pet. App. at 42).

[30]Vernon Pet. at 4, 9-10, n.26.

[31]District Court Findings of Fact, ¶¶ 7.3-7.5 (Pet. App. at 42-43).

[32]955 F.2d 1366 (Pet. App. at 10).

evidence was produced. Moreover, the District Court's opinion does not, as Vernon suggests (Pet. at 9), state that the resultant increase in retail rates from granting Vernon "relative share access" was the result of competition between Vernon and Edison. As the District Court found, and Vernon itself conceded, the increase in retail rates derives from increased costs to the retail ratepayer as low cost power is shifted away from Edison's other customers to Vernon. Rate making procedure, not competition, causes this shift.[33]

F. The Court Of Appeals Decision.

1. Rulings Rejecting Liability Under Sherman Act § 2.

On *de novo* review, the Court of Appeals affirmed the District Court's granting of summary judgment on Vernon's foreclosure damage claim. As to Vernon's claim for "relative size share access," the Court of Appeals ruled that "Vernon did not point to any facts in opposition to Edison's motion for summary judgment which would create a material issue of fact" as to Edison's assertion of a "legitimate business justification for refusing [such access]." 955 F.2d 1366 (Pet. App. at 10).[34] Instead, the Court of Appeals noted, "Vernon asserted that Edison's business justification was insufficient as a matter of law" and, alternatively, that "if the asserted justification was not insufficient as a matter of law, a jury should be permitted to decide whether a slight increase in retail prices to Edison's customers was a legitimate business reason for Edison's refusal to grant relative size share transmission access." *Id.* (Pet. App. at 9-10).

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[33]*See* District Court Findings Of Fact, ¶¶ 3.16-3.18 (Pet. App. at 36-37).

[34]Hence, the Court of Appeals affirmed the District Court's conclusion that Vernon's proferred evidence did not create a factual issue as to "pretextuality." That the Court "did not say why Vernon's evidence of pretextuality was insufficient" (Pet. at 10 n.26) is explained by the fact that there was no such evidence.

The Court of Appeals stated that, "[a]t the time of the summary judgment, Vernon did not appear to dispute the fact that retail customers would pay increased rates if it received the access sought — indeed, Vernon's damage study reflected that fact. Nor did Vernon appear to dispute the fact that Edison was legitimately concerned about retail rates in making its facilities access decisions." *Id.* (Pet. App. at 10). And citing its companion decision filed the same day, the Court of Appeals held: "It is legitimate for Edison to refuse access that will affect its rates to the detriment of its customers." *Id. citing City of Anaheim v. Southern California Edison Co.*, 955 F.2d 1373, 1381 (9th Cir. 1992).[35]

The Court of Appeals ruled that Vernon "has the burden of proving that [Edison] acted without a legitimate business justification. 955 F.2d at 1366 (Pet. App. at 10). And, to survive summary judgment, Vernon was required to, but failed to, point to evidence demonstrating that there was a genuine issue of fact as to whether Edison in fact acted on the asserted grounds. The Court added that "Vernon fails to demonstrate just why Edison is required to cease using its own facility so that Vernon can begin using it. This is not a situation where Edison has no use for the facility and arbitrarily denied someone else its use. Nor is it a case where Edison simply refused to supply Vernon its power needs." *Id.* (Pet. App. at 10-11) (citations omitted).

The Court of Appeals further ruled that "even had Vernon offered some evidence which raised a material issue of fact with respect to Edison's reasons for refusing relative size share access, we can find no authority — and Vernon has pointed to none — which supports Vernon's theory that 'reasonable' access must take the form of relative size share access." *Id.* at 1367 (Pet. App. at 11). The Court added: "Even more to the point, Vernon admits that it never requested relative size share access to Edison's transmission facilities." 955 F.2d 1367 (Pet. App. at 11)

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[35]Thus, the Court of Appeals, like the District Court, explicitly addressed, rather than "disregarded" (Pet. at 10), the "legitimate competitive justification" for Edison's conduct.

2. Ruling Dismissing Antitrust Claims For Inadequate Proof Of Damages.

The Court of Appeals also affirmed summary judgment in Edison's favor on the foreclosure claims "for the independent reason" that "Vernon presented the court with a damage study which was, at best, seriously flawed." *Id.* at 1371 (Pet. App. at 19). The Court ruled that "the only possibly admissible damage study" before the Court "failed to segregate losses, if any, caused by acts which were not antitrust violations from those which were." *Id.* at 1372 (Pet. App. at 21). The Court added that "Vernon's deeply flawed study is the handmaiden of its equally flawed theory that it should have proportionate firm access to Edison's whole system at all times." *Id.*

The Court of Appeals further concluded that it had "no confidence" in the possibility that Vernon could repair its "seriously flawed" damages study, stating: "Vernon insists that all of Edison's acts contributed to the damage figures but the district court and we have already found that many of those acts were proper." *Id.* at 1372 (Pet. App. at 22). The court thus "agree[d] with the district court that the serious flaws in the only damage study which would be proffered to the jury placed Vernon in the position of having no proper proof of damages at all." *Id.*

III.

THE COURT SHOULD DENY VERNON'S PETITION FOR WRIT OF CERTIORARI

A. Introduction.

The Court of Appeals rulings at issue here are grounded in clear and correct reasoning and undisputed facts. This case only becomes extraordinary by virtue of Vernon's distortions of those rulings, the record, and applicable law.

1. The Court Of Appeals Rulings Regarding The Inadequacy Of Vernon's Damage Study, Which Are Essentially Unchallenged By Vernon, Provide An Independent Basis For Denying The Writ.

As an independent ground for summary judgment on Vernon's antitrust claim, the Court of Appeals properly ruled that the "serious flaws" in "the only damage study which could be proffered to the jury" placed Vernon in the position of having no proper proof of damages — and hence unable to establish any essential element of a § 2 claim for damages. 955 F.2d 1373 (Pet. App. at 22). Vernon's petition does not even address, much less assail, the Court of Appeals ruling that Vernon damage study was "seriously flawed" by its failure to "segregate the losses, if any, caused by acts which were not antitrust violations from those that were." *Id.* at 1372 (Pet. App. at 21). Nor does Vernon dispute the court of appeals' finding that "Vernon would not or could not" make corrections to properly segregate the losses caused by antitrust violations. *Id.* Finally, Vernon cannot point to any authority contrary to the Court's ruling that Vernon needed to prove that its claimed damages were caused by illegal acts. Indeed, that ruling is in line with several authorities cited in the Court of Appeals decision (though ignored by Vernon's Petition). *See* 955 F.2d 1372-73 (Pet. App. at 19-22).

2. The Court Of Appeals Rulings On The Foreclosure Damages Claims Are Proper And Should Not Be Disturbed.

The Court of Appeals correctly concluded that an owner of a facility may legitimately use it for itself and need not give priority to a purported "competitor" without adversely affecting competition. Indeed, a contrary ruling would, in the words used by the Court of Appeals, "stand[ ] the essential facility doctrine on its head." 955 F.2d 1367 (Pet. App. at 11).

As both courts below recognized, the access that Vernon demands in its litigation posture necessarily is limited to situations in which Edison is fully utilizing its transmission lines to import low-cost power for the benefit of all its customers. When Edison is fully using its transmission lines, as the result of the utility ratemaking process, Vernon automatically receives a pro rata

share of the benefits of all low-cost power imports consummated by Edison. If Edison lost access to these low-cost power sources as a result of transferring transmission capacity to a third party such as Vernon, it would be forced to meet its load requirements by relying on more expensive generating resources. Use of these resources would cause economic harm to Edison's remaining customers because their costs of service would necessarily be higher.[36] In view of this undeniable shift of benefits and the detrimental impact on Edison's retail customers, it is quite clear why Vernon had to concede, as it did before the District Court, that the demanded access would have adversely affected Edison's remaining customers.

Vernon apparently now seeks to disavow this concession of adverse impact. (Pet. at 3) Hedging its bets, however, in the same breath Vernon concedes an impact, but asserts that it is competition, rather than an increase in costs, that could have caused it. (Pet. at 3-4) This assertion conflicts with the record and findings below. Vernon's concession was not that increased "competition" would have affected Edison's retail customers; rather, Vernon's position, fully confirmed by its own damage study, was that granting the access would have, as a result of the ratemaking process, increased costs to Edison's retail customers. Nor is the impact only in the short term as now claimed by Vernon. According to the Vernon's study, the adverse impact on Edison's retail customers would take place over the full period of Vernon's damage study. There is also no dispute that the cumula-

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[36]In setting rates at both the retail and wholesale levels, Edison's regulators use the concept of "rolled in" costs. A utility such as Edison relies on a number of generating resources, *e.g.*, its own generating sources and power purchased from other utilities, in order to meet its customers' requirements. The rates charged its customers are based upon an average of the costs associated with all its resources so that no one customer or group of customers receives only the benefits of the lower cost resources. The type of access demanded by Vernon would change this procedure to the detriment of Edison's other customers. *See City of Anaheim, supra,* 955 F.2d 1381.

tive impact on Edison's retail customers would be in the millions.[37]

B. Arguments Supporting Opposition To Vernon's Petition For Writ.

1. The Ninth Circuit Did Not Err In Ruling That The Impermissibly Speculative Nature Of Vernon's Damage Study Provided Independent Grounds For Dismissal Of Vernon's Section 2 Claim For Damages.

As the Ninth Circuit properly recognized, an antitrust plaintiff must not only demonstrate antitrust liability, but also provide a reasonable estimate of the amount of damages actually suffered. 955 F.2d 1372-73 (Pet. App. at 19-20); *see also Dolphin Tours, Inc. v. Pacifico Creative Serv., Inc.*, 773 F.2d 1506, 1509 (9th Cir. 1985). Damage awards based on speculation or guesswork are expressly prohibited. *See McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 808 (9th Cir. 1988). This proscription applies "even though the defendant by his own wrong doing has made precision impossible." *Zenith Radio Corp. v. Hazeltine Research*, 359 U.S. 100, 123-24 (1969).

The Court of Appeals properly concluded that "the only possibly admissible damage study before the Court"[38] was "at best seriously flawed." 955 F.2d 1371-72 (Pet. App. at 19). Specifically, "that study failed to segregate the losses, if any,

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[37]*See* CR 182 at 26-54. *See also* Russell Depo., CR 177 at 298; CR 182 at 55-62.

[38]955 F.2d 1372 (Pet. App. 21). The District Court did not, as Vernon suggests (Pet. at 4, 26 n.55), admit the damage study into evidence. The study was before the court only in connection with Edison's motion for summary judgment, and was not even offered by Vernon. Vernon's cited reference to the transcript of the District Court suggests only that the damage study would have been admitted into evidence had the case gone to trial. The District Court also stated, however, that it did not know what the jury would do, for example, if only one of Vernon's antitrust claims were valid or if the jury concluded that Edison had violated the antitrust laws in a way not modeled in the study. *See* CR 262 at 19.

caused by acts which were antitrust violations from those that were not." *Id.* at 1372 (Pet. App. at 21). Vernon "would not" and "could not" make corrections to properly segregate damages. *Id.*[39] Indeed, the author of Vernon's damage study admitted that if any of the assumptions underlying his calculations are incorrect or must be disregarded, the damages would necessarily be reduced, but he was unable to quantify by what amount.[40] Thus, as the Court of Appeals recognized, to the extent a jury concluded that some of the challenged conduct was legal, it could not make a damage award solely for the illegal conduct without engaging in impermissible speculation. 955 F.2d 1372-73 (Pet. App. at 21-22).[41]

In view of these serious, uncorrectable flaws in Vernon's proof of damages, which are unaddressed by Vernon's Petition, there can be little doubt as to the correctness of the Court of Appeals dismissal of the case on this ground alone.

Vernon's only challenge to the ruling on the inadequacy of its damage proof is to the Court's rejection of Vernon's theory — assumed by Vernon's damage study — that it should have proportionate firm access. This challenge, of course, does not address, and thus would not disturb, the primary grounds (as discussed above) underlying the Court of Appeals ruling rejecting Vernon's proof of damages. In any event, Vernon offers nothing to demonstrate the court erred in ruling that: "We can find no

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[39]Vernon instead insisted "that all of Edison's acts contributed to the damage figure." *Id.* at 1373.

[40]*See, e.g.,* Russell Depo. CR 177 at 141-42, 159-60, 197-203, 252-53, 398, 401, 404, 409-10.

[41]*Citing ILC Peripherals Leasing Corp. v. IBM Corp.,* 458 F. Supp. 423, 434 (N.D. Cal. 1978), *aff'd sub nom., Memorex Corp. v. IBM Corp.,* 636 F.2d 1188 (9th Cir. 1980), *cert. denied,* 452 U.S. 972 (1981); *Farley Transp. Co. v. Santa Fe Trail Transp. Co.,* 786 F.2d 1342, 1352 (9th Cir. 1985). The District Court has also identified this danger as lurking within Vernon's study. The District Court's liability ruling in this case, of course, presages the likelihood of this problem actually occurring.

authority — and Vernon has pointed to none — which supports Vernon's theory that 'reasonable' access to Edison's facilities *must* take the form of relative size share access." 955 F.2d 1561, 1367 (9th Cir. 1992) (emphasis added).

2. The Ninth Circuit's Ruling That Edison Cannot Be Held Liable Under Section 2 Of The Sherman Act For Refusing To Allow Additional Access To Its Transmission Lines When The Admitted Effect Of Providing The Demanded Access Would Result In An Increase In Costs To The Utility's Remaining Customers Is In Accord With The Opinions Of This Court And With Those Of Other Circuits, And Antitrust Policy.

The § 2 liability issue posed below and here is whether Edison's failure to provide the access demanded by Vernon in its damage study breaches its obligations under Section 2 of the Sherman Act. Edison submits that nothing in the decisions of this Court or those of the circuits require Edison to provide such access.

As this Court has previously acknowledged, and the courts below relied upon, there is no general unqualified duty for a firm possessing monopoly power to assist its competition. *Aspen Skiing Co. v. Aspen Highlights Skiing Corp.*, 472 U.S. 585, 600-01 (1985). If the monopolist had a legitimate business justification for its conduct, the plaintiff cannot prevail on its § 2 claim. *Id.* at 604-05, 608. Moreover, even the complete denial of access to an essential facility — though there was no such denial here — does not violate § 2 if there is a legitimate business justification for the denial. *See* Areeda, "Essential Facilities: An Epithet of Limiting Principles," 58 Antitrust L.J. 841, 852 (1989) ("denial of access is never *per se* unlawful; legitimate business purpose always saves the defendant").[42]

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[42]*See also* District Court Findings of Fact, ¶ 7.2 (Pet. App. at 42); *City of Anaheim, supra*, 955 F.2d 1381 ("If the Pacific Intertie were an essential facility, Edison could still deny access if it had legitimate business reasons for the denial").

a. Vernon's Petition misstates the "business justification" ruling challenged here.

Vernon's Petition misstates the business justification ruling of the Ninth Circuit, and misapplies the legal parameters of the legitimate business justification analysis. The Ninth Circuit's "business justification" analysis in this case does not entail "protecting a monopolist or its customers from potential adverse affects of competition." (Pet. at 13). As developed above, "competition" plays no part in the increase in retail rates that would result from acceding to Vernon's demand. Vernon has never even attempted to explain why an unwarranted shift of benefits from one group of customers to another would benefit competition, or would be inconsistent with the conclusion that Edison was doing anything other than attempting to "protect itself against loss by operating with superior services, lower costs and improved efficiency." *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973).[43]

b. The Ninth Circuit's ruling does not conflict with Supreme Court decisions.

None of the Supreme Court authorities cited by Vernon undermines the Ninth Circuit decision that "[i]t was legitimate for Edison to refuse access that will affect its rates to the detriment of its customers." 955 F.2d 1366 n.10 (Pet. App. at 10).

National Society of Professional Engineers v. United States, 435 U.S. 679 (1978) involved an agreement among engineers which operated as an "absolute ban on competitive bidding," thus having the effect of maintaining higher price levels. Indeed, the proffered "business justification" for this agreement was to prevent low bids. 435 U.S. 693. Here, of course, Edison's business justification was not to increase price. Rather, as is undisputed

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[43]Moreover, as demonstrated by Vernon's total failure to cite to any evidence, there was no showing, nor any argument, that the "refusal" to provide pro rata access was for the purpose of "restraining competition in the relevant [power] markets." (Pet. at 18).

here, "retail customers would pay increased rates if Vernon received the access sought — indeed Vernon's damages study reflected that fact." 955 F.2d 1366 (Pet. App. at 10).

The ruling below does not in any sense constitute "a frontal assault on the basic [competition] policy of the Sherman Act." *National Society of Professional Engineers*, 435 U.S. at 695. True competition contemplates a competitor using, in the most efficient way possible, its own resources to produce lower prices and better services for all of its customers. That is precisely what Edison is seeking to do by using its own transmission facilities. To confiscate a portion of one competitor's facilities to give it to another competitor does not assist competition, but serves as a subsidy to that competitor — which is the antithesis of competition.

Vernon alternatively argues (Pet. at 16) that under Supreme Court decisions "a monopolist's exclusionary conduct is not excused because a competitor can still buy the monopolist's products." This argument is based upon a misstatement of the record and the Court of Appeals' decision here, and the law generally. Vernon has not, despite its suggestion, been the victim of any price-gouging by Edison. All of Edison's resale rates to Vernon are at regulated prices, based upon actual cost of services and approved by the FERC. The supply to Vernon of all of the power it requires at FERC approved prices itself belies its claim that it has been denied reasonable access to transmission service. *See City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641, 649 (10th Cir. 1992), *petition for cert. filed* (Jan. 25, 1992) ("As a matter of law, we find that Williams' supply of gas at FERC approved prices provided the Cities with reasonable access to the pipelines," thus defeating any essential facilities claim).

Finally, despite Vernon's contention to the contrary, both the Court of Appeals (Pet. App. at 11) and the District Court (Pet. App. at 43) properly addressed this Court's opinion in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973). Edison's conduct in affording Vernon, as well as the other resale Cities, transmission service over its network whenever space is available sharply distinguishes its conduct from that challenged by the plaintiff in *Otter Tail*. In *Otter Tail*, the electric utility defendant refused to supply wholesale power *and* refused to wheel any power

to its wholesale customers, despite available transmission space on its lines. 410 U.S. at 371. There was further evidence that the defendant was actively pursuing a plan to take over the municipal distribution systems lying within its control area whenever possible. *Id.* at 372. There is no such evidence in this case which could cast doubt on the validity of Edison's proffered business justifications.

c. Vernon's Petition misapplies the legal parameters of the legitimate business justification analysis.

Vernon incorrectly asserts (Pet. at 17) that Edison bears the burden of proving the validity of its business justification. The business justification concept is not an "affirmative defense" but is an essential element of a Section 2 case. As the Court of Appeals properly ruled, the § 2 antitrust *plaintiff bears* the burden of proving that the defendant's conduct is not supported by legitimate business concerns. 955 F.2d 1366 (Pet. App. 10), *citing Image Technical Serv., Inc. v. Eastman Kodak Co.*, 903 F.2d 612, 620 & n.9 (9th Cir. 1990), *aff'd, sub nom., Eastman Kodak Co. v. Image Technical Serv., Inc.*, ____ U.S. ____, 112 S. Ct. 2072 (June 8, 1992); *Calculators Hawaii, Inc. v. Brandt, Inc.*, 724 F.2d 1332, 1338-39 (9th Cir. 1983).

Vernon's reliance (Pet. at 17) on *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 113 (1984), is misplaced. There the Court was dealing with an unreasonable "restraint of trade" under § 1 of the Sherman Act. As the Court of Appeals recognized, in a § 1 case, the defendant bears the burden of proving a legitimate business justification for a concerted restraint of trade. 955 F.2d 1370 (Pet. App. at 17-18). In a § 2 case, however, the plaintiff has the burden of proving the defendant acted without a legitimate business justification. *Id.*, 955 F.2d 1366 (Pet. App. at 10), *citing Image Technical*, 903 F.2d 620 n.9.[44]

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[44]The language quoted (Pet. at 17) from the Supreme Court's opinion in *Eastman Kodak Co. v. Image Technical Serv. Inc., supra,* — *i.e.*, that the Court could not conclude as a matter of law that the "anticompetitive effects of Kodak's behavior are outweighed by its competitive

In any event, here the burden of proof issue was mooted because Vernon agreed with Edison that "the sufficiency of Edison's proffered business justification is a matter of law and is thus appropriate for resolution pursuant to Edison's Foreclosure Motion."[45] Because Vernon affirmatively embraced this principle up through the District Court's ruling on Edison's summary judgment motion, Vernon did not even attempt to offer evidence contravening the facts underlying Edison's business justification in its response to Edison's pleading.[46] Thus, regardless of the burden of proof, there was no evidence introduced by Vernon that would create an issue of fact on the business justification issue.

Contrary to Vernon's assertions (Pet. at 18-19), under the applicable legal precedent, the admitted economic harm to Edison's other customers is a sufficient business justification precluding Edison from liability under the antitrust laws. Indeed, the relevant case law provides that both economic and technical constraints will constitute the requisite "infeasibility." In *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1133 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983), the Seventh Circuit suggested that if the antitrust defendant demonstrated "legitimate business *or* technical reason[s]" for its denial of the plaintiff's access to its telephone exchange facilities, the defendant would

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effects" — does not relate not to a plaintiff's burden in a § 2 case. Instead it addresses Kodak's claim that it was entitled to a legal presumption that the asserted procompetitive effects of a § 1 tying arrangement outweighed the anticompetitive effects, despite the presence of factual issues as to the validity of the claimed business justifications. *Eastman Kodak Co. v. Image Technical Serv. Inc., supra*, 112 S. Ct. 2088-89. Of course, here, the Ninth Circuit, in contrast to its decision in *Image Technical Serv. Inc.*, determined there was no factual dispute as to Edison's asserted legitimate business justification. 955 F.2d 1366 (Pet. App. at 10).

[45]District Court Findings Of Fact ¶ 4.4 (Pet. App. at 38); *see also* CR 196 at 3, Issue No. 4; *see also id.* at 3A, Issue Nos. 5, 12-13.

[46]*See* Court of Appeals opinion, 955 F.2d 1366 (Pet. App. 10) ("as noted by the district court, Vernon did not point to any facts in opposition to Edison's motion for summary judgment which would create a material issue of fact").

not have violated Section 2. *Id.* (emphasis added). *See also Image Technical Serv., Inc. v. Eastman Kodak Co., supra*, 903 F.2d at 620; *Laurel Sand & Gravel Inc. v. CSX Transp. Inc.*, 924 F.2d 539, 545 (4th Cir. 1991), *cert. denied*, ____ U.S. ____, 116 L.Ed.2d 39 (1992) (where granting access to an essential facility would alter the nature of defendant's existing business, it had a legitimate business justification for not acceding to the access request).[47]

d. The Ninth Circuit decision does not permit "monopoly to beget monopoly."

Vernon alternatively argues the Ninth Circuit decision falls afoul of a theory of "monopoly abuse." (Pet. at 19-20). The argument is presumably predicated on an assertion that Edison misused its monopoly power over its own transmission lines to gain a competitive advantage or impair competition in bulk power markets. Vernon, of course, did not compete with Edison in the transmission of electric power; Vernon instead purports to have competed with Edison in the *purchase* (but not the sale) of power in separate bulk power markets.

Vernon's reliance on *Lorain Journal Co. v. United States*, 342 U.S. 143, 154 (1951), to support its "monopoly leveraging/monopoly abuse" theory is misplaced. As this Court underscored in *Aspen Highland Skiing, supra*, 472 U.S. 608, a monopolist's qualified right to refuse to deal with a competitor, as discussed in *Lorain Journal*, is to be viewed in reference to whether the refusal was justified by any "legitimate business justification." In *Lorain Journal*, the would-be monopolist (a newspaper) had no legitimate reason for refusing to sell advertis-

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[47]As the District Court ruled below, even a complete denial of access to an essential facility is not an antitrust violation provided there is a legitimate justification for the refusal. *See Becker v. Egypt News Co.*, 713 F.2d 363, 366 (8th Cir. 1983); *Venture Technology, Inc. v. National Fuel Gas Co.*, 1980-81 Trade Cas. (CCH) ¶ 63,780, at 78,169 (W.D.N.Y. 1981), *rev'd on other grounds*, 685 F.2d 41 (2d Cir.), *cert. denied*, 459 U.S. 1007 (1982). *See generally* Easterbrook, *On Identifying Exclusionary Conduct*, 61 Notre Dame L. Rev. 972 (1986).

ing to those who patronized a competitor. Lacking any such legitimate reason for the refusal, the newspaper was viewed as having the predatory aim to "destroy its small competitor." *Lorain*, 342 U.S. 154; *Aspen Highlands*, 472 U.S. 608. Here, the rulings of a legitimate business justification — based as they were on facts admitted by Vernon — distinguish this case from *Lorain* and, as a matter of law, defeat any claim of "monopoly abuse."

e. The Ninth Circuit decision does not conflict with the decisions of other circuits.

Vernon cannot support factually or legally its argument (Pet. at 21-22) that the Ninth Circuit decision conflicts with the decisions of other circuits. As in earlier arguments, Vernon begins its discussion here by a mischaracterization of the issue addressed by the Ninth Circuit. The issue is not, as Vernon frames it (Pet. at 21), whether one who controls an essential facility must "share it fairly with competitors." The question is whether "fair sharing" required the owner of the facility to forego its own use of its facilities to the detriment of its customers so that a purported competitor can use it.

None of the cases cited by Vernon conflicts with the district court's and the Ninth Circuit's opinions analyzing the fair access issue. The Ninth Circuit appropriately addressed the Seventh Circuit's holding in *MCI Communications v. American Tel. & Tel. Co., supra*, 708 F.2d 1133. As the Ninth Circuit stated, "[t]his is not a situation where Edison had no use for the facility and arbitrarily denied someone else access to it." 955 F.2d 1366 (Pet. App. at 10.) This distinguishes the instant case from the facts supporting § 2 liability in *MCI Communications*. There AT&T denied requested interconnections to its telephone exchange facilities even though there was "no legitimate business or technical reason" for the refusal and AT&T was not asked to "in any way" abandon its facilities. 708 F.2d 1133.

Also distinguishable is *Delaware & Hudson Ry Co. v. Consolidated Rail Corp.*, 902 F.2d 174 (2d Cir. 1990), *cert. denied*, ____ U.S. ____, 114 L.Ed. 125 (1991), where, as Vernon states (Pet. at 22), access was offered "on unreasonable terms." Here, of course, the rulings challenged are predicated on the absence of

any triable dispute as to "legitimacy" and hence "reasonableness" of Edison's refusal to grant Vernon the "relative share firm access" assumed by its damage study.

Finally, the language Vernon quotes from *City of Mishawaka v. American Elec. Power Co. Inc.*, 616 F.2d 976, 981 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981) (Pet. at 23), has been taken out of context. The Court of Appeals there was referring to the "trial court's view" that the utilities' admittedly unduly discriminatory rate filings were not protected by the *Noerr-Pennington* doctrine because the utilities' conduct (*e.g.*, threatening the future wholesale supply of the municipalities, acquisition of municipalities in distress) suggested a "specific intent" to monopolize. *Id.* at 981-83. Here, of course, Vernon does not now contend that Edison's rates to Vernon were unduly discriminatory or predatory. Indeed, as the district court below found, if Edison had acceded to grant Vernon "relative share firm access," it would have resulted in "discrimination in favor of wholesale customers and against the retail customers." District Court Findings Of Fact, ¶ 3.18 (Pet. App. at 37).

f. The Ninth Circuit decision is in accord with several recent circuit court decisions.

The Court of Appeals decision here is well in line with a substantial body of recent circuit court decisions dismissing § 2 claims alleging denial of access to essential facilities.

In *City of Chanute, Kan. v. Williams Nat. Gas Co., supra*, 955 F.2d 641, the Tenth Circuit affirmed summary judgment in favor of a pipeline owner on § 2 action against it by eight cities who were denied access to the pipeline (an asserted "essential facility") for the transportation of gas purchased from third parties. The cities specifically sought damages from Williams for the time it closed its pipeline to the transportation of gas from third parties. The court stated: "As a matter of law, we find Williams' supply of gas at FERC approved prices provided the Cities with reasonable access to the pipelines." *Id.* at 649.[48] The court also affirmed

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[48] *See also Town of Concord, Mass v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990), *cert. denied*, ____ U.S. ____, 113 L.Ed.2d 268

summary judgment dismissal of the Cities' § 2 monopolization claim, ruling that the pipeline closure to third party gas was not motivated by anticompetitive intent but rather by Williams' "legitimate business concern" over its "own take-or-pay liability" and the desire "to prevent conversion of sales service to transportation." *Id.*, *citing Illinois ex rel. Burris v. Panhandle Eastern Pipe Co.*, 935 F.2d 1469, 1485 (7th Cir. 1991), *cert. denied*, ____ U.S. ____, 117 L.Ed.2d 415 (1992).[49]

In *Laurel Sand & Gravel Inc. v. CSX Transp. Inc.*, *supra*, 924 F.2d 549, the Fourth Circuit affirmed a summary judgment dismissal of § 2 action by a sand/gravel distributor and shortline railroad against a national railroad for its refusal to grant trackage rights to its railroad, an asserted "essential facility." The court there ruled the defendant-railroad asserted a legitimate business justification for denying the access request, which, if granted, would have altered the nature of defendant's existing business. *Id.*

In *Alaska Airlines Inc. v. United Airlines Inc.*, 948 F.2d 536 (9th Cir. 1991), *cert. denied*, ____ U.S. ____, 118 L.Ed.2d 316 (1992), the Ninth Circuit affirmed summary judgment in favor of defendant airlines who were charged with "leveraging" their control over the computerized reservation systems (CRS) — a claimed "essential facility" — to gain a competitive advantage in the downstream air transportation market. The Ninth Circuit rejected plaintiff's argument that § 2 liability could be imposed even if there was no monopolization of the down-stream market. The Ninth Circuit read *Otter Tail* as an "extreme case" in which the " 'upstream' monopolist," Otter Tail, "baldly refused to deal with its potential " 'downstream competitor' " — thus "eliminat[ing] all possibility of competition in the downstream

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(1991) ("regulation significantly diminishes the likelihood of major antitrust harm").

[49]The Tenth Circuit, relying on *Panhandle Eastern Pipe Co.*, thus distinguished *Otter Tail* as "inapplicable to the facts of this case as some of the Cities have effective toll requirements contracts with Williams and Williams was subject to regulations that required it to transport third party gas to the Cities." *Id.*

market . . . for 'retail' electric services." *Id.* at 543.[50] This interpretation of *Otter Tail* accords perfectly with that of the Court of Appeals decision challenged here. *See also Rural Telephone Service Co. v. Feist Publications Inc.*, 957 F.2d 765, 769 (10th Cir. 1992).

IV.

CONCLUSION

For the foregoing reasons, Edison requests that this Court deny Vernon's petition for a writ of certiorari to the United States Court of Appeal for the Ninth Circuit.

DATED: August 20, 1992

Respectfully submitted,

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[50]The Court also rejected the "monopoly leveraging" doctrine as an independent theory of liability under § 2: "Even in a two market situation, a plaintiff cannot establish a violation of Section 2 without proving that defendant used its monopoly power in one market to obtain, or attempt to attain, a monopoly in the downstream, or leveraged, market." *Id.*

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

CITY OF VERNON
Petitioner,
VS.
SOUTHERN CALIFORNIA EDISON COMPANY,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF OF THE PETITIONER

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PETITIONER'S REPLY BRIEF

Edison's responding brief answers neither of the two important questions presented by Vernon's petition, both of which are raised by the record and ripe for decision. Instead, Edison replies to its own questions and supplies answers that contradict the evidence that Vernon produced in opposition to summary judgment and the law of this Court followed by other circuits.

I.

EDISON HAS NOT AND CANNOT RECONCILE THE NINTH CIRCUIT'S BUSINESS JUSTIFICATION HOLDING WITH THE DECISIONS OF THIS COURT

Edison had tried to justify its anticompetitive conduct by arguing that it maintained low price levels for its customers. It argues that *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), rejecting a business justification defense based on maintaining price levels, applies only to maintaining high price levels; therefore the validity of its conduct is not affected by the decision.[1] The holding cannot be thus confined. The antitrust vice is using anticompetitive means to maintain prices at any level because such price maintenance tampers with price which is the " 'central nervous system of the economy.' " *Id.* at 692.[2]

Edison does not deny that it offered no evidence that its exclusionary conduct has any pro-competitive effects or produced any efficiency gains, as required by *Eastman Kodak Co. v. Image Technical Serv. Inc.*, ___ U.S. ___ [112 S.Ct. 2072] (1992) and *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608 (1985).[3] According to Edison, it did not need to prove either requirement of *Eastman Kodak* and *Aspen Skiing* because

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[1]Edison's Responding Brief ("EB") at 21.

[2]*Cf. Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982).

[3]Edison does not even discuss *Aspen Skiing* on this point, citing the case only for the unexceptional principles that a monopolist has no general unqualified duty to assist its competitor and that a legitimate

Edison was using its transmission monopoly "in the most efficient way possible" for the benefit of its customers. (EB at 20.) In a remarkable rhetorical flourish, Edison describes Vernon's efforts to buy transmission from it as a confiscation of its property. *Ibid.* Arguing that monopoly is more efficient and better for its customers than competition is "nothing less than a frontal assault on the basic policy of the Sherman Act" (*National Society of Professional Engineers*, 438 U.S. at 695).[4]

Edison argues that *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) is distinguishable because "the electric utility defendant refused to supply wholesale power *and* refused to wheel any power to its wholesale customers, despite available transmission space on its lines." (EB at 20-21 [Edison's emphasis].) *Otter Tail* cannot be distinguished on those grounds. Edison always had available transmission space on its lines more than adequate to serve all of Edison's needs and those of the Resale Cities, including Vernon.[5] Nothing in *Otter Tail* suggests that a utility with a transmission monopoly is excused from its antitrust duty to share transmission fairly with municipal utilities simply because it is willing to sell its two different products — wholesale power and transmission — in a single package.[6] Instead, the *Otter Tail* Court approved an injunction requiring the utility to offer the municipalities transmission as well as wholesale power. The terms of the injunction would not have been explicable if the Court had decided that the utility would have fulfilled its antitrust duty by continuing to supply its two-product package to the municipalities

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justification excuses anticompetitive conduct, neither of which is in dispute here. EB at 18.

[4]Edison does not acknowledge that anticompetitive conduct is unreasonably exclusionary when it injures its competitors and their customers even if its own customers might temporarily enjoy some benefits from its conduct. *Aspen Skiing*, 472 U.S. at 605.

[5]*See* discussion *infra*, pp. 6-7.

[6]Wholesale power and transmission are different products; each is bought and sold separately. *Utah Power & Light Co.*, 45 FERC ¶ 61,095 at 61,284 (1986).

as captive customers.[7] The *Otter Tail* court also recognized that granting the requested relief did not impose any onerous supervisory burdens on the courts because the federal regulatory agency, like FERC today, was fully equipped to supervise the terms, conditions and rates for transmission access.

Relying on *City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641, 649 (10th Cir. 1992), *petition for cert. filed* (June 25, 1992), Edison argues that its two-product package fulfilled its duty to share transmission fairly because its rates were regulated by FERC. (EB at 20.)[8] Rate regulation was not an excuse accepted in *Otter Tail*. Rate regulation is not a substitute for the antitrust laws, as Congress itself has made clear.[9] Antitrust laws, not rate regulation, are the congressional means of policing the competitive process.[10]

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[7]If an offer to sell wholesale power alone were enough to discharge Edison's duty to deal, then Edison had no duty to offer Vernon a reasonable integrated operations agreement ("IOA"), permitting Vernon to purchase power from some non-Edison suppliers. The Ninth Circuit concluded that Edison had that duty in addition to offering to sell Vernon power at wholesale, and Edison has ignored that holding which it did not seek to have reviewed. (App. at 11-12.)

[8]Even if *City of Chanute's* reasoning was correct on the facts of that case, it gives no comfort to Edison because the regulatory history and industry response in the natural gas industry differ sharply from that in the electric utility industry.

[9]Pet. at 23.

[10]Rate regulation is based on Edison's costs, not on its efficiency or its competitive conduct. Although rate regulators have refused to approve rate increases when the costs have not been justified, they do not impose efficiency standards or insist on competitive pricing. *E.g.*, CPUC disallowed more than $43 million in charges by Edison to its ratepayers because Edison purchased extravagantly expensive power from its own unregulated affiliate. O'Malley Decl., Ex. I, filed Sept. 17, 1990 (CR 298; ER 967).

"A rate may not be so unreasonably high as to warrant rejection, [by rate regulators], and yet be considerably higher than the rate the regulated company would be willing to accept under pressure of

Vernon is not complaining that it has "been the victim of any price-gouging by Edison." (EB at 20.) Its complaint is that Edison's exclusionary conduct has thwarted the competitive process from which Vernon has individually suffered antitrust injury. Its continued ability to buy transmission bundled with Edison's power does not cure the injury to the competitive process because it denies Vernon (and other Resale Cities) the opportunity to compete with it in buying wholesale power from others. If Edison were correct, it (and every other monopolistic electric utility) could indefinitely perpetuate and extend its monopoly in the relevant markets with antitrust impunity. This Court has never accepted that result.

Edison ignores *City of Lafayette v. Louisiana Power & Light*, 435 U.S. 389 (1978) and the circuit court opinions holding that a monopolist's anticompetitive conduct is not excused because its conduct might have benefited its own customers or constituents.[11] It also ignores *Aspen Skiing's* requiring that the effects of anticompetitive acts on all market participants and relevant consumers, not just on consumer-customers of the monopolist, must be considered in deciding whether the particular conduct was unreasonably exclusionary.

Edison cannot defend the Ninth Circuit's shifting the burden of proof to Vernon on the business justification defense to uphold the judgment on the ground that Vernon did not carry its burden of producing enough evidence to prove that Edison's justification was invalid. (EB at 21.) *Eastman Kodak, Aspen Skiing* and *NCAA v. Board of Regents of Univ. of Oklahoma*, 648 U.S. 85 (1984) imposed the burden of proving business justification on antitrust defendants in both Sections 1 and 2 cases. Contrary to Edison, no rational basis exists for relieving a monopolist of proving a valid business justification to excuse its behavior under Section 2 when the same monopolist doing the same acts would have the burden if it did not act alone (Section 1). This Court has not so held. The Ninth Circuit's impermissible shifting the

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competition." Turner, "The Scope of Antitrust and Other Economic Regulatory Policies," 82 *Harv. L. Rev.* 1207, 1235 (1969).

[11]Pet. at 18-19.

burden of proof to Vernon was highly prejudicial because, until that court did so, Vernon had no reason and no opportunity to produce all of its evidence on the invalidity of Edison's defense.[12]

II.

EDISON HAS NOT ERASED THE INTERCIRCUIT CONFLICTS

The Ninth Circuit decision is consistent only with its own opinion in *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536 (9th Cir. 1991), *cert. denied*, ___ U.S. ___ [18 L.Ed.2d 316] (1992) and, perhaps, with *City of Chanute*.[13] It is irreconcilable with the decisions of all the other circuits cited in the petition.[14]

Edison unsuccessfully attempts to distinguish *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983), *Delaware & Hudson Railway Co. v. Consolidated Rail Corp.*, 902 F.2d 174 (2nd Cir. 1990), *cert. denied*, ___ U.S. ___ [114 L.Ed.2d 125] (1991), and *City of Mishawaka v. American Elec. Power Co., Inc.*, 616 F.2d 976, 981 (7th Cir. 1980), *cert. denied*, 449 U.S. 1095 (1981). (EB 24-25.) Edison argues, without evidentiary support, that unlike those cases, (1) Edison was "fully utilizing" all of its lines for its other customers and, therefore, selling transmission to Vernon would have required it "to forego its own use of its facilities to the detriment of its customers" (EB at 24); (2) Vernon did not carry its burden of proving that its reasons for denying transmission

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[12]Nevertheless, Vernon *did* produce substantial evidence that Edison's exclusionary conduct was not motivated by concern for its ratepayers, but by anticompetitive animus. Pet. at pp. 4, 12.

[13]*Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539 (4th Cir. 1991), *cert. denied*, ___ U.S. ___ [116 L.Ed.2d 39 (1992)] is not in point because defendant had no antitrust obligation to change its basic business to accommodate the plaintiff. Transmission is a part of Edison's existing business.

The district court recognized that the circuits were in conflict on the point. RT at 16 (May 14, 1990).

[14]Pet. at 21-23.

were illegitimate and its conduct was reasonable (EB at 24-25); and (3) granting Vernon "relative share firm access" would have discriminated " 'in favor of wholesale customers against the retail customers.' " (EB at 25.) The record, including Vernon's evidence, was directly contrary to all three statements.

The first statement implies that all of Edison's lines were fully loaded to supply power to its native load customers. Edison has not and cannot challenge Vernon's showing that Edison does not mean that a line is fully loaded when it says that it is "fully utilized." In Edison's lexicon, a line is always fully utilized unless it is disconnected.[15] Edison did not and could not rebut Vernon's evidence that, at all relevant times, Edison had more than enough capacity to serve all of its native load customers and all of the Resale Cities (including Vernon) with more to spare and that it would not have to stop transmitting on any line to serve Vernon.[16] Edison failed to reveal to the lower courts the fact disclosed in the "*CPUC Merger Case*"[17] that it had 400 MW of excess transmission capacity which was more than twice enough to supply Vernon transmission without any impact on Edison's other customers. CPUC found that Edison's transmission restraints were anticompetitively motivated.[18] When that decision became final while this case was pending on appeal, Vernon promptly invoked collateral estoppel.[19] Edison has not and cannot deny that it conceded on appeal that selling Vernon reasonable transmission

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[15]Pet. at 3, n. 2.

[16]Pet. at 4, n. 4.

[17]122 PUR 4th 225 (1991), App. at 73 *et seq.*

[18]122 PUR 4th at 258, App. at 76, 78.

[19]App. at 79. Edison incorrectly states that Vernon did not properly submit the decision to the lower courts or timely invoke collateral estoppel. EB at 2, n. 1. The record establishes that Vernon presented the decision to the district court in its motion for reconsideration as soon as it came down, included a copy of the decision in its appendix filed in the Ninth Circuit, and invoked collateral estoppel with respect to it in its reply brief and its petition for rehearing.

would not have burdened its system.[20] In fact, Edison chose to forego transmission revenues to prevent Vernon's buying power from Edison's rival wholesale vendors.

Edison's second distinction falls because it rests on the erroneous legal premises that its exclusionary conduct was justified, that it had no duty to sell any transmission to Vernon and, even if it did, the transmission it permitted under the generic IOA adequately fulfilled that duty even though FERC invalidated its terms as unreasonable, and that proportional sharing (hypothesized in Vernon's damage study) was unreasonable as a matter of law. (EB at 24-25.)[21]

Edison's third reason is likewise incorrect. Vernon's attack is not on discriminatory rates, but on Edison's exclusion of "rivals on some basis other than efficiency" whereby Edison's conduct is deemed predatory. *Aspen Skiing Co.*, 472 U.S. at 605. The same predation principle was applied in *City of Mishawaka v. American Elec. Power Co, Inc.*, 616 F.2d 976, 981 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981).

Here, and throughout the rest of its brief, Edison persists in stating that Vernon's liability claim was based on proportional access (relative-size share). It was not. Vernon's claim was that Edison was obliged to sell it reasonable access on reasonable terms, as this Court required in *Otter Tail* and *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912). Pro rata access was used only to compute the prices that Vernon would have paid for power if it had been permitted to compete with Edison and to compare those prices with the prices that Vernon actually paid. Edison implies that the Ninth Circuit was right in holding that reasonable access could not be measured by proportionate sharing; yet, it has not and cannot distinguish the authorities cited in

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[20]Pet. at 14.

[21]Contrary to Edison, *Delaware & Hudson Ry. Co. v. Consolidated Rail Corp.*, 902 F.2d 174 (2d Cir. 1990), *cert. denied*, ___ U.S. ___ [114 L.Ed.2d 125] (1991) is directly on point. (EB at 24.) The only access that Edison permitted until SC-12 became effective in January, 1987 was on terms found unreasonable by FERC.

Vernon's petition accepting that measure as reasonable and its own use of the same concept.[22] Edison has thereby conceded the point.

Throughout its brief, Edison also seeks to convey the impression that its conduct was not anticompetitive because it has generously shared transmission. It did not.[23] Edison refused *any* transmission or capacity credits for non-Edison power until it finally offered the unreasonable generic IOA to settle pending antitrust claims against it; it refused to integrate Vernon's own power resources under an IOA until 1986. It has never sold any firm transmission on its import "EHV" lines that would permit Vernon to compete with it in buying power from its rival wholesale vendors. It has permitted *only* EHV transmission allowing Vernon to reach its *own* Mead/Hoover power for which entitlement Edison cannot compete. After SC-12 was implemented in January, 1987, Edison has sold Vernon short-term transmission on its intra-Basin network thereby permitting Vernon to buy power from vendors whose resources can be reached on that network. That limited access prevents Vernon from competing with Edison in the bulk power markets in the Pacific Northwest and those east of the Colorado River, as Vernon correctly stated in its petition.[24] Edison has admitted that short term access is inadequate to permit a municipality to engage in effective long-range planning.

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[22]Pet. at 26.

[23]Edison's suggestion that a formal demand would have moved it to supply reasonable access (EB at 9) was refuted by Vernon's evidence of repeated demands and refusals of any access. Edison conceded that the futility question was triable. Edison's Opp. Essential Facilities Mo. at 5.

[24]Edison's contrary statement (EB at 7) is contradicted by the indisputable facts in the record. Edison's sometimes willingness to provide interruptible transmission service (*Ibid.*) does not constitute reasonable sharing of transmission because, by definition, Edison can interrupt that transmission at any time — as it did, without justification, to destroy Vernon's rights under its contract with Nevada Power Company.

III.

VERNON'S DAMAGE STUDY WAS NOT FATALLY FLAWED

Unable to defend the Ninth Circuit's holding that pro rata sharing is unreasonable, Edison attempts to uphold the decision on the ground that the court correctly decided that the study was inadmissible for failure to disaggregate losses " 'caused by acts which were antitrust violations from those that were not.' " (EB at 16-17.) That court failed to point to any particular damages that it attributed to lawful rather than unlawful acts, other than its erroneous determination that Vernon was not entitled to pro rata access.[25] If any further segregation were to become necessary (which at the pre-trial stage is speculative), corrections could easily be made in the existing study.[26] The Ninth Circuit impermissibly deprived Vernon of the opportunity ever to try its damage case by imposing restrictions on pre-trial damage computations that are far more stringent than this Court has accepted to quantify damages in a case tried on the merits.[27]

In violation of settled summary judgment law, the Court here disregarded Vernon's evidence in opposition to summary judgment, as it did throughout its opinion.

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[25]Vernon was not required to segregate damages because summary judgment was affirmed on Vernon's Section 1 claim; the same conduct is actionable under Section 2 when Edison acted alone. Pet. at 25, n. 53.

[26]The Ninth Circuit's reliance on the Flanigan affidavit to support its conclusion that the damage study could not be corrected is contradicted by the affidavit itself. The affidavit said that damages for group boycott under Section 1 should not be separated from damages under Section 2 because to do so would have permitted Vernon to recover twice for the same anticompetitive acts of Edison. Vernon's Petition for Rehearing at 24-25.

[27]*Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-25; *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 561-66 (1931).

CONCLUSION

The issues here joined are of great importance to the electric utility industry as well as to Vernon. The resolution of the conflict in the Circuits has a direct and immediate bearing on the future development of that industry. If allowed to stand, it is a barrier to efforts of regulators and of industry participants to create a more efficient industry upon which the Nation depends, and it will exalt the parochial self-interest of a monopolist over the national policy of competition.

Dated: September 4, 1992.

Respectfully submitted,

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